No. 14-______

In the Supreme Court of the United States

NACS (FORMERLY KNOWN AS NATIONAL ASSOCIATION OF CONVENIENCE STORES), NATIONAL RETAIL FEDERATION, FOOD MARKETING INSTITUTE, MILLER OIL CO., INC., BOSCOV'S DEPARTMENT STORE, LLC, AND NATIONAL RESTAURANT ASSOCIATION,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Banks charge merchants an "interchange fee" on every one of the more than 100 million debit card transactions that occur each day. By statute, Congress required that the Board of Governors of the Federal Reserve System establish a debit interchange fee standard to limit those fees. *See* 15 U.S.C. § 1693o-2(a). Congress specified that banks may not recoup through the interchange fee any costs "not specific to a particular electronic debit transaction." *Id.* § 1693o-2(a)(4)(B)(ii).

Notwithstanding that express limitation, the Board's final Rule permits banks to recover through the interchange fee their fixed costs of operating debit card programs, including the costs of network hardware, software and labor.

The Question Presented is:

Does the Board's regulation establishing a maximum allowable debit card interchange fee, 12 C.F.R. § 235.3, unlawfully permit banks to recover costs forbidden by the governing statute, 15 U.S.C. § 1693o-2(a)(4)(B)?

PARTIES TO THE PROCEEDING

NACS (formerly known as the National Association of Convenience Stores), National Retail Federation, Food Marketing Institute, Miller Oil Co., Inc., Boscov's Department Store, LLC, and National Restaurant Association are petitioners here and were plaintiffs-appellees below.

The Board of Governors of the Federal Reserve System is the respondent here and was the defendant-appellant below.

CORPORATE DISCLOSURE STATEMENT

NACS (formerly the National Association of Convenience Stores) has no parent companies, subsidiaries, or affiliates, and is privately held. No publicly held company owns 10% or more of NACS.

The National Retail Federation ("NRF") and its subsidiary, NRF Enterprises, are privately held. No publicly held company owns 10% or more of NRF.

The Food Marketing Institute ("FMI") does not have any parent companies, subsidiaries, or affiliates requiring disclosure. No publicly held company owns 10% or more of FMI.

The National Restaurant Association ("NRA") is a non-profit corporation, with no parent companies, subsidiaries, or affiliates which have outstanding securities in the hands of the public.

Miller Oil Company, Inc. has no parent companies, subsidiaries, or affiliates, and is privately held. No publicly held company owns 10% or more of the stock of Miller Oil Company, Inc.

Boscov's Department Store, LLC, is a subsidiary of Boscov's Inc., a privately held corporation. No publicly held company owns 10% or more of the LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 746 F.3d 474. The opinion of the district court (App. 46a-116a) is reported at 958 F. Supp. 2d 85.

JURISDICTION

The court of appeals entered its decision on March 21, 2014. The Chief Justice subsequently extended the time to file this Petition for a Writ of Certiorari to and including August 18, 2014. Appl. No. 13A1199. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2012).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Appendix (App. 117a-35a) reproduces the relevant statutory and regulatory provisions.

STATEMENT OF THE CASE

Banks charge merchants an "interchange fee" on every debit card transaction. Congress required the Board of Governors of the Federal Reserve System ("Board") to establish a standard to limit those fees. 15 U.S.C. § 1693o-2(a) (2012). The statute specifies that banks may not use the fee to recover costs they incur "which are not specific to a particular electronic debit transaction." *Id.* § 1693o-2(a)(4)(B)(ii). The Board nonetheless adopted a Rule under which banks recover their fixed costs of operating debit card programs, such as the general costs of acquiring and maintaining network equipment, computer hardware, and software. The district court invalidated the Rule on the ground that it permits banks to recover through the interchange fee costs that are plainly excluded by the statute. But the D.C. Circuit reversed, holding that the Rule was valid in relevant part under the extraordinary deference applicable to "ratemaking" proceedings.

I. FACTUAL BACKGROUND

1. Debit cards are an electronic means to withdraw funds in bank accounts. *See* Debit Card Interchange Fees and Routing: Final Rule, 76 Fed. Reg. 43,394, 43,395 (July 20, 2011) (codified at 12 C.F.R. pt. 235). Having evolved from their early use to withdraw cash from automatic teller machines, debit cards now essentially operate as electronic checks at the point of sale. *Id.*

Debit cards have "eclipsed checks as the most frequently used noncash payment method." *Id.* Roughly eight million locations in the United States—convenience stores, supermarkets, restaurants, online merchants, schools, hospitals, charities, and everywhere in between—accept them. *See id.* All told, merchants[1] conduct approximately fifty billion debit card transactions each year—well over 100,000,000 per day—that account for more than

[1] For simplicity, we use "merchants" to refer to the entities that accept debit cards.

$1.4 trillion in payments. *See id.* at 43,395 n.8; *see also* App. 2a.

The bank that issues a debit card to a consumer (known for that reason as the "issuing bank") incurs various costs in the course of providing debit card services to its customers. These include the fixed costs that make it possible for banks to process debit card transactions in the first place. For example, banks pay a fee to be members of a debit card network like Visa or MasterCard. Banks incur other fixed costs, such as the cost of acquiring and maintaining the necessary computer hardware and software. *See generally* 76 Fed. Reg. at 43,424-30. Those fixed costs are often shared with the bank's credit card operations as well because banks usually use a common computer system for both. *Id.* at 43,429.

With a debit card program in place, the consumer's issuing bank also incurs a variety of other costs in the course of processing particular debit card transactions. These costs accordingly vary with the number of transactions. Every time a consumer presents a debit card to a merchant to make a purchase, a three-step process of authorization, clearance, and settlement gives rise to those costs:

1. The merchant's bank sends an "authorization" request to the customer's issuing bank over a debit card network. The issuing bank incurs costs in the course of confirming that the transaction is genuine and that the customer has enough money in her account;

2. If the transaction is authorized, the merchant sends a "clearance" request to the issuing bank, which incurs costs related to confirming the

amount of the transaction and deducting the funds from the customer's account[2]; and

3. The issuing bank then incurs costs in "settling" the transaction by transferring the funds to the merchant's bank.

See generally App. 4a-7a (describing the process in greater detail); 76 Fed. Reg. at 43,396. In the course of each transaction, the issuing bank also pays a "network processing fee" to the debit card network. *See* 76 Fed. Reg. at 43,430.

Although debit cards have many similarities to traditional checks, one very significant difference is that the customer's bank does not charge the merchant a fee to deposit a check. In industry parlance, checks clear "at par." 76 Fed. Reg. at 43,400. The bank "recoups some or all of these costs [relating to checks] through fees it charges to its customers or the interest it earns on the customer's balances." *Id.*

By contrast, the bank charges merchants a substantial "interchange fee" during each debit card transaction. App. 7a; *see also* 15 U.S.C. § 1693o-2(c)(8).[3] Those debit interchange fees have skyrocketed. "[M]erchants faced market-wide effective interchange increases of an estimated 234% between

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[2] Some transactions combine authorization and clearance into a single communication. 76 Fed. Reg. at 43,396.

[3] The merchant's bank passes through the interchange fee to the merchant by deducting it from the amount credited to the merchant's account for the transaction. *See* App. 7a; *see also* 76 Fed. Reg. at 43,396.

1998 and 2006." Comments of the Merchants Payments Coalition in Docket No. R-14 04/RIN No. 7100AD63 (Debit Card Interchange Fees and Routing, 75 Fed. Reg. 81,722 (proposed Dec. 28, 2010)) (Feb. 22, 2011) at 2. By 2009, debit interchange fees had reached over $16.2 billion annually. *See* App. 9a, 53a; *see also* 76 Fed. Reg. at 43,396. Indeed, for most retailers, payment card fees had become the single largest operating expense after payroll, with debit and credit interchange fees as the largest components. *See* Cover Letter to Comments of the Nat'l Ass'n of Convenience Stores in Docket No. R-14 04/RIN No. 7100AD63 (Debit Card Interchange Fees and Routing, 75 Fed. Reg. 81,722 (proposed Dec. 28, 2010)) (Feb. 22, 2011) at 1; *see also* App. 53a.[4]

The principal reason for the explosion in the debit interchange fee has been the duopoly of Visa and MasterCard. Those card networks all but eliminated the incentive for banks to compete with each other—and absorb costs associated with debit card transactions—through lower interchange fees. *See* App. 53a-55a. Both networks required merchants to accept their branded debit cards as a condition of being permitted to accept their ubiquitous credit cards. The networks thereby "leverage[d their existing] credit card network infrastructure" to build a dominant market position in the debit card market as well. 76 Fed. Reg. at 43,395. Together, they now

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[4] Banks also charge an "interchange fee" on credit card transactions. The statute and rulemaking at issue in this petition concern only the fee applied to debit card transactions.

process more than eighty percent of debit card transactions. *See* 76 Fed. Reg. at 43,395; *see also* App. 8a.

With the debit and credit card networks firmly tied together, banks issued their customers Visa- and MasterCard-branded debit cards that imposed high interchange fees on merchants. The "[m]erchants were therefore stuck paying whatever fees" were imposed, unless they refused to accept all of Visa and MasterCard's debit and credit cards—"hardly a realistic option for most merchants given the popularity of plastic." App. 8a; *see also id.* 54a ("Merchants know that if they do not accept those cards and networks, they risk losing sales, and losing the sale would be costlier to the merchant than accepting debit and paying the high interchange fee." (quotation marks omitted)).[5]

2. Acting aggressively "to correct the market defects that were contributing to high and escalating [debit interchange] fees," App. 9a, Congress enacted the Durbin Amendment as part of Section 920 of the 2010 Dodd-Frank legislation. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 1693o-2). That statute requires the Board to estab-

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[5] Although these tying practices were eventually severed through a consent decree in a private antitrust lawsuit, *see In re VisaCheck/MasterMoney Antitrust Litigation*, 192 F.R.D. 68 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir. 2001), by that time the market power of Visa and MasterCard (reflected in their current massive share of the debit card market more than a decade later) was already firmly entrenched.

lish standards for the amount of debit interchange fees for the nation's largest banks, which together process roughly sixty percent of debit transactions.[6]

At the broadest level of generality, Congress required the Board to adopt regulations that would ensure that the interchange fee is "reasonable and proportional to the cost incurred by the [issuing bank] with respect to the transaction." 15 U.S.C. § 1693o-2(a)(2) & (a)(3)(A). But Congress did not permit banks to shift all of their costs associated with debit card transactions to merchants. Instead, the statute required the Board to "distinguish between" two categories of costs:

> (i) the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction, which cost shall be considered . . . ; and
>
> (ii) other costs incurred by an issuer which are not *specific* to a *particular* electronic debit transaction, which costs shall not be considered . . . .

Id. § 1693o-2(a)(4)(B)(i)-(ii) (emphasis added).

Using substantially broader language, Congress also authorized banks that complied with anti-fraud

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[6] Roughly 130 banks with assets in excess of $10 billion are subject to the Durbin Amendment, *see* 76 Fed. Reg. at 43,422 n.106, with smaller banking institutions exempt from its interchange fee standard. *See* 15 U.S.C. § 1693o-2(a)(6)(A) (exempting banks with assets of less than $10 billion).

standards established by the Board to recoup certain fraud-prevention costs through a separate adjustment to their interchange fee. *Id.* § 1693o-2(a)(5). Specifically, qualifying banks may recover costs "incurred by the issuer in preventing fraud *in relation to* debit *transactions involving* that issuer." *Id.* § 1693o-2(a)(5)(A)(i) (emphasis added).

3. The Board issued a Notice of Proposed Rulemaking to implement the Durbin Amendment. *See* Debit Card Interchange Fees and Routing: Proposed Rule, 75 Fed. Reg. 81,722 (Dec. 28, 2010); *see also* App. 65a. It proposed to permit issuing banks to charge an interchange fee of up to twelve cents per transaction. *See* 75 Fed. Reg. at 81,736-39; *see also* App. 11a.

The Board explained that establishing a maximum interchange fee could not be analogized to ratemaking proceedings in which an agency—such as the Federal Energy Regulatory Commission—exercises the broad authority to determine the recoverable costs of a regulated entity. 75 Fed. Reg. at 81,733 n.44. Instead, Congress had limited the Board's discretion by specifying that "incremental costs" of authorization, clearance and settlement were necessarily recoverable, whereas costs "not specific to a particular electronic debit transaction" were necessarily excluded. 15 U.S.C. § 1693o-2(a)(4)(B)(i)-(ii).

The Board noted that the statute was "silent" with respect to a third category of costs—those "that are specific to a particular transaction other than incremental costs incurred by an issuer for authorizing, clearing, and settling the transaction." 75 Fed.

Reg. at 81,734. But it recognized that even this third category might at most permit banks to pass on only costs that arise in the course of a particular transaction, such as "cardholder rewards that are paid . . . for each transaction." *Id.* at 81,735.

The Board ultimately determined to permit banks to recover through the interchange fee only "those costs that are specifically mentioned for consideration in the statute." *Id.* at 81,734-35. The proposed rule would permit issuing banks to use the fee to recoup their incremental costs "associated with authorization, clearing, and settlement of a transaction." *Id.* at 81,734. By contrast, the Board would "not consider costs that are common to all debit card transactions and could never be attributed to any *particular* transaction (*i.e.*, fixed costs), even if those costs are specific to debit card transactions *as a whole*." *Id.* at 81,736 (emphasis added).

The Board further concluded that the appropriate measure of banks' "incremental costs" was "average variable cost"—*i.e.*, the "per-transaction value" of those costs that "vary with the number of transactions." *Id.* at 81,735. This measure was faithful to the statute because it "yields the cost of a typical or average transaction." *Id.* The Board recognized that banks could experience some logistical difficulties if they were required to separately identify their fixed and variable costs. *Id.* at 81,736. But the Board proposed to provide a "safe harbor" fee that any bank could charge without separately accounting for its individual costs. *Id.* at 81,737.

4. In response, banks waged an aggressive campaign to persuade the Board to expand dramatically

the costs they could pass on through the interchange fee, including particularly their fixed costs.[7] The Board acquiesced, issuing a final Rule that "almost doubled the proposed cap" from twelve cents to twenty-one cents per transaction, plus a further 0.05% of the transaction's value. App. 11a-12a; *see* 12 C.F.R. § 235.3(b); *see also* 76 Fed. Reg. at 43,394. Indeed, with respect to hundreds of millions of transactions every year (those costing less than twelve dollars), the Rule authorized banks to impose an interchange fee that was *higher* than was customary at the time that Congress directed the Board to impose the cap. *See* App. 101a.

The Board did not require banks to determine their individual costs, however. Instead, it provided that all banks were authorized to charge the maximum allowable fee. As a result, banks could "retain

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[7] *See* Paul Blumenthal, *Revolving Door Lobbyists Populate Coalition Fighting Debit Fee Rules*, Sunlight Foundation Blog (April 15, 2011), http://sunlightfoundation.com/blog/2011/04/15/revolving-door-lobbyists-populate-coalition-fighting-debit-fee-rules/; *see also* Blake Ellis, *Why Banks Are Fighting Over 12 Cents*, CNN Money (Mar. 11, 2011), http://money.cnn.com/2011/03/11/pf/debit_interchange_fees/ ("[T]he battle is getting pitched and banks are spending huge sums lobbying against" a twelve-cent fee cap); *Federal Reserve Issues Final Ruling on Durbin Amendment*, NerdWallet finance (June 29, 2011), http://www.nerdwallet.com/blog/current-events/federal-reserve-issues-final-ruling-durbin-amendment/ ("Since the passage of the Dodd-Frank bill, banks and credit unions petitioned to water down the regulations or remove them altogether.").

the difference between their [actual] costs and the cap." 76 Fed. Reg. at 43,434.

In explaining the final Rule, the Board again stressed that the Durbin Amendment does not confer upon it the equivalent of ratemaking authority. 76 Fed. Reg. at 43,434. But it rejected its prior reading of the Durbin Amendment and, in particular, its determination that the statute excludes costs that the bank does not separately incur in the course of "each transaction." *See id.* at 43,426.

The final Rule instead now "interpret[ed] costs that are not specific to a particular electronic debit transaction, and therefore cannot be considered by the Board, to mean those costs that are not incurred *in the course of effecting any* electronic debit transaction." *Id.* at 43,426 (emphasis added) (internal quotation marks and citation omitted). On this reading, "[t]he statute allows the Board to consider any cost that is not prohibited—*i.e.*, any cost that *is* incurred in the course of effecting an electronic debit transaction." *Id.* Thus, banks may pass on "all costs *related to*" effecting a debit card transaction. *Id.* at 42,427 (emphasis added).

In applying that standard, the Board "distinguishe[d] between [permissible] costs incurred in *effecting* electronic debit transactions and [forbidden] broader program costs." 76 Fed. Reg. at 43,428 (emphasis added). The latter category—which banks could not recover—included the costs that banks "incurred without regard to whether, how often, or in what way an electronic debit transaction will occur." *Id.* It also included those costs that were not exclusive to debit card operations. *Id.* at 43,427.

On that basis, the Board forbade banks from recovering through the interchange fee "[c]ard production and delivery costs [because] they are not incurred in the course of effecting electronic debit transactions." *Id.* at 43,428. The Board also read the statute to exclude the cost of becoming a member of the debit card network, reasoning that although "network membership is necessary in order to process transactions over a particular network, membership fees are not incurred each time a cardholder uses a debit card and, in fact, are incurred for activities other than those related to particular electronic debit transactions, such as marketing and research and development." *Id.* Similarly, the Board excluded banks' general overhead costs, such as executive compensation, because those costs "are shared across all product lines of the issuer and are not specific to a particular electronic debit transaction." *Id.* at 43,427.

But the Board reversed its prior determination that banks could not use the fee to recoup their fixed costs—*i.e.*, "costs to connect to the network and to purchase and operate the hardware and software used for processing transactions, including associated labor cost." 76 Fed. Reg. at 43,427; *see also id.* at 43,429-30. The Board concluded that these costs were within the permissible category of costs incurred in "effecting" debit card transactions. It reasoned that banks must incur these costs "to effect each transaction because the issuer must be able" to authorize the transaction by using the relevant equipment. *Id.* at 43,429-30. "[N]o electronic debit transaction can occur without incurring these costs, making them costs specific to each and every electronic debit transaction." 76 Fed. Reg. at 43,427; *see also id.* at 43,430 ("Each transaction uses the equipment, hardware, software and associated labor, and no particular transaction can occur without incurring these costs.").

The Board specified that it made no difference that many of the banks' fixed costs—for example, the costs to create or maintain a computer system to connect to the network—were jointly incurred to conduct *both* "debit card and credit card operations." *Id*. at 43,429. In such a case, the "costs . . . were allocated to electronic debit transactions on a pro rata basis" in establishing the interchange fee. *Id.*

The Board separately addressed whether issuing banks could recover certain fraud-related costs through the basic interchange fee. The Board determined that all banks could include in the basic interchange fee the costs of monitoring "particular" transactions for fraud, but not the general costs of monitoring accounts "at times other than when the issuer is effecting the transaction." *Id.* at 43,431. According to the Board, the latter was governed instead by the separate provision of the Durbin Amendment permitting qualifying banks to impose an additional charge to recover their general "costs incurred by the issuer in preventing fraud in relation to electronic debit *transactions*" involving that issuer. *Id*. at 43,394 (emphasis added).[8]

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[8] That fraud prevention adjustment was the subject of a separate rulemaking. *See* Debit Card and Interchange Fees and Routing, Final Rule, 77 Fed. Reg. 46,258 (Aug. 3, 2012) (codified at 12 C.F.R. § 235.4).

II. PROCEEDINGS BELOW

1. Petitioners are individual merchants and also trade associations that collectively represent hundreds of thousands of U.S. businesses. They filed this suit against the Board in the U.S. District Court for the District of Columbia challenging the Rule under the Administrative Procedure Act.[9]

On cross-motions for summary judgment, the district court held that the Rule is invalid. The court concluded that "the Board completely misunderstood the Durbin Amendment's statutory directive and interpreted the law in ways that were clearly foreclosed by Congress." App. 113a. In particular, the district court had "no difficulty concluding that the statutory language evidences an intent by Congress to bifurcate the entire universe of costs associated with interchange fees," precluding the Board from recognizing an implied third category of costs over which it has complete discretion. *Id.* 80a.

In reaching that conclusion, the district court rejected the Board's reasoning that banks may pass on their fixed costs to merchants because those costs were "particular" to *all* debit card transactions. The costs forbidden by the statute "that are 'not specific to a particular debit transaction,' § 1693o-2(a)(4(B)(ii), simply are not the same as costs that are 'not specific to debit transactions as a whole,' 76 Fed. Reg. at 43,426." App. 94a (emphases omitted).

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[9] Petitioners also challenged a separate provision of the Rule governing card network non-exclusivity. *See* App. 39a, 102a-12a. That issue is not before this Court.

The Durbin Amendment thus unambiguously "directed the Board to omit other costs incurred by an issuer which are not unique to a distinct or individual transaction." *Id.* 85a-86a (quotation marks and alterations omitted). The district court accordingly vacated the Rule and remanded to the Board to adopt a new maximum fee consistent with the statute's plain terms. *Id.* 115a-16a.

2. On the Board's appeal, the D.C. Circuit reversed. Devoting most of its analysis to rejecting the district court's holding that the Durbin Amendment establishes two exclusive categories of costs, the court of appeals explained that this part of its ruling was governed by "the familiar two-step framework" of *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* App. 15a-16a. The court concluded that the statute was sufficiently ambiguous to permit the Board to recognize a third category of costs over which it had discretion. *Id.* 18a-29a.

The D.C. Circuit then went "on to consider whether the statute allows recovery of 'fixed'" costs as part of that discretionary category, App. 18a, or whether the statute instead prohibits recovery of those costs because they are "'not specific to a particular . . . transaction,'" App. 30a (quoting 15 U.S.C. § 1693o-2(a)(4)(B)(ii)). *See also* Pet'rs' C.A. Br. 35, 39; Pet'rs' C.A. Reply Br. 26-27. The court of appeals recognized that the Board's reading of this statutory provision was contradictory. The Board interpreted "the term 'specific to a particular . . . transaction' as in fact allowing recovery of *many costs* not literally 'specific' to any one 'particular' transaction," including the "costs of hardware, software, and labor."

App. 38a (emphasis added). But those fixed costs "seem no more 'specific' to one 'particular' transaction than" the general transaction-monitoring costs that the Board had *excluded* from the general interchange fee because they must be addressed as part of the additional charge for costs relating to "electronic debit *transactions*." *Id.*

Despite that substantial inconsistency, the D.C. Circuit sustained the Board's conclusion that banks may pass on their fixed costs through the interchange fee. In reaching that conclusion, the court neither applied the *Chevron* framework nor identified any relevant ambiguity in the statutory prohibition for the Board to resolve. Instead, the court agreed with the Board that the Rule is valid in relevant respect because Congress required that the interchange fee "be 'reasonable and proportional' to issuer costs." App. 32a; *see also id.* 17a.

The court of appeals read that statutory provision to effectively require the Board to engage in a "ratemaking"—a type of proceeding to which the courts owe "special deference." *Id.* 29a-30a (citing *BNSF Ry. Co.* v. *Surface Transp. Bd.*, 526 F.3d 770, 774 (D.C. Cir. 2008)). The court was accordingly required to uphold the Rule unless it was "'patently unreasonable, having no relationship to the underlying regulatory problem.'" App. 33a (quoting *ExxonMobil Gas Mktg. Co.* v. *FERC*, 297 F.3d 1071, 1085 (D.C. Cir. 2002)).

The Rule was lawful under that extremely forgiving standard, the D.C. Circuit concluded, because it was logical and logistically sensible. The distinction between fixed and variable costs that the Board had originally drawn in its Notice of Proposed Rulemaking "depends entirely on whether, on an issuer-by-issuer basis, certain costs happen to vary based on transaction volume in a particular year." *Id.* 31a. Further, "'issuers' cost-accounting systems are not generally set up to differentiate between fixed and variable costs.'" *Id.* 32a (quoting 76 Fed. Reg. at 43,427). Applying its ratemaking precedent in lieu of *Chevron*, it held that, "[g]iven the Board's expertise, we see no basis for upsetting its reasonable line-drawing." *Id.* 33a (citing *ExxonMobil Gas*, 297 F.3d at 1085).

This petition followed.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit committed a significant legal error in upholding an agency rule that has multi-billion-dollar consequences for millions of parties every year. By excluding costs incurred by banks which are "not specific to a particular electronic debit transaction," 15 U.S.C. § 1693o-2(a)(4)(B)(ii), Congress plainly prohibited banks from passing their fixed costs on to merchants. The court of appeals did not identify any ambiguity in that prohibition but instead sustained the Rule only by applying precedent that grants agencies plenary authority over ratemaking proceedings.

That ruling requires this Court's intervention. The Rule is invalid under the *Chevron* framework because the statute unambiguously forbids recovering fixed costs, or at least because the Board's interpretation is unreasonable. The Board itself repeatedly recognized that it does not possess anything resembling ratemaking authority. It is therefore no surprise that even a leading *critic* of the Durbin Amendment has described the ruling below as "an intellectual train wreck." Richard A. Epstein, *The Improbable Fate of the Durbin Amendment in the Circuit Court of Appeals for the District of Columbia: A Learned Court Makes Intellectual Hash of an Ill-Conceived Statute*, PointofLaw.com (Mar. 28, 2014), http://pointoflaw.com/columns/2014/03/improbable-fate-of-the-durbin-amendment.php.

This Court's intervention is warranted because of the importance of the Rule and the gravity of the D.C. Circuit's error. This challenge to the Board's rulemaking, brought by organizations representing a wide cross-section of the merchant community affected by the Rule, is the only challenge to the Rule's validity. If this Court denies review, then the Rule will unlawfully permit banks to inflate by billions of dollars each year the interchange fees they charge American merchants and, in turn, American consumers. This Court should not countenance the Board's disregard of Congress's will. Certiorari accordingly should be granted.

I. THE DURBIN AMENDMENT PROHIBITS THE BOARD'S INTERCHANGE FEE STANDARD.

Congress expressly prohibited banks from passing on through the interchange fee their costs "which are not specific to a particular electronic debit transaction." 15 U.S.C. § 1693o-2(a)(4)(B)(ii). In the Notice of Proposed Rulemaking, the Board recognized that the statute by its terms permits banks to recover only costs incurred on the basis of "each" transaction. 75 Fed. Reg. at 81,735-36. But in a complete about-face, the final Rule permits banks to recover their fixed costs—*i.e.*, costs that do not vary with the number of transactions and are incurred generally to provide debit card services (and often credit card services as well). It reasoned that "no electronic debit transaction can occur without incurring [fixed] costs, making them costs specific to each and every electronic debit transaction." 76 Fed. Reg. at 43,427.

The Board cited no accepted meaning of the relevant statutory terms that would support that reading. Nor could one be found. A cost is "specific" to a transaction only if it is "limiting or limited; specifying or specified; precise; definite; explicit." *Webster's New College Dictionary* 1376 (2007). Especially when followed by "to," it means "restricted to a particular individual, situation, relation, or effect." Merriam-Webster.com, http://www.merriam-webster.com/dictionary/specific (last visited Aug. 13, 2014).

A "particular" transaction refers only "to a part or portion of anything; separate; sole; single; individual; specific; local; comprising a part only; partial in extent; not universal." *Black's Law Dictionary* 1119 (6th ed. 1990).

The particular "electronic debit transaction" for which the bank incurs the relevant costs is "*a* transaction in which *a* person uses *a* debit card." 15 U.S.C. § 1693o-2(c)(5) (emphasis added). *See also id.* § 1693o-2(c)(8) ("interchange transaction fee" is a fee that "compensate[s] an issuer for its involvement in *an* electronic debit transaction" (emphasis added)).

The meaning of the prohibition is unambiguous. Banks may not recoup costs which are not restricted [<u>specific</u>] to an individual [<u>particular</u>] transaction in which a person uses a debit card [electronic debit transaction]. *See* App. 85a-86a ("Congress thus directed the Board to omit other costs incurred by an issuer which are not [unique] to a [distinct or individual] transaction." (alterations in original) (internal quotation marks omitted)). By contrast, banks may recover through their interchange fee the incremental cost that arises from a particular transaction.

The Board's contrary reading in the final Rule is baseless. It opined that fixed costs were "specific to *each and every* electronic debit transaction." 76 Fed. Reg. at 43,427 (emphasis added). That is nothing more than an implicit acknowledgement that those costs are, in the D.C. Circuit's own words, "not literally 'specific' to any one 'particular' transaction." App. 38a. As the Board itself expressly recognized in the Notice of Proposed Rulemaking, "costs that are common to all debit card transactions . . . could never be attributed to any *particular* transaction (*i.e.*, fixed costs), even if those costs are specific to debit card transactions *as a whole*." 75 Fed Reg. at 81,736 (emphasis added). Nothing in the final Rule justifies abandoning that clear and correct reading. *See also* App. 94a ("Costs that are 'not specific to a particular debit transaction,' § 1693o-2(a)(4)(B)(ii), simply are not the same as costs that are 'not specific to debit transactions as a whole,' 76 Fed. Reg. at 43,426." (emphases omitted)).

It takes little imagination to illustrate how the Rule conflicts with the statute's obvious meaning. The costs "specific to a particular meal" do not, in any ordinary sense, include the fixed cost of a $500 stove. The costs "specific to a particular phone call" do not include the fixed cost of a $200 telephone. The D.C. Circuit itself conceded the "persuasive power" of this plain understanding, acknowledging that "[o]ne might think it a stretch if a shoe store claimed that the rent it paid its landlord is somehow 'specific' to a 'particular' shoe sale." App. 31a.

This Court employs that same ordinary understanding. It has held, for example, that a capital defendant may not be placed in shackles during his trial unless "justified by a state interest specific to a particular trial"—that is, concerns that are "case specific" and "related to the defendant on trial." *Deck* v. *Missouri*, 544 U.S. 622, 629, 633 (2005). It has also concluded that only those federal medical device regulations "specific to a particular device" preempt state law, whereas "federal labeling and manufacturing requirements" did not qualify because they reflect only "generic concerns about device regulation generally." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 500-01 (1996) (internal quotation marks omitted).

So too, the costs "specific to a particular electronic debit transaction" do not include the billions of dollars in fixed costs of the computer equipment and software that make it possible to provide debit (and credit) card services. Banks accordingly must recoup those costs through other revenue streams (as they do with the costs of processing checks), rather than passing those costs on to merchants through the debit interchange fee. *See* 76 Fed. Reg. at 43,460 (noting that banks are "likely to implement some changes in response to the reduction in interchange fee revenue," including "alternative sources of revenue").

The precise wording of the statutory prohibition is no accident. If Congress had intended to confer on the Board the authority to determine whether banks could recover the wide array of fixed costs claimed by the Rule, it could have and would have used different language that appears in other provisions of the Durbin Amendment to refer generally to the costs of debit card programs. For example, the statute authorizes the separate adjustment "for costs incurred by the issuer in preventing fraud *in relation to* electronic debit *transactions involving* that issuer." 15 U.S.C. § 1693o-2(a)(5)(A)(i) (emphasis added). The Board itself explicitly contrasted this broad language with the language of Section 920(a)(4)(B)(ii), explaining that Congress intended the fraud prevention provision's use of "transactions" to address "'a broad spectrum of transactions that are not linked to a particular transaction.'" App. 38a (quoting Resp't's C.A. Br. 66-67). The statute also required banks to report "fees" they charge "*in connection with* the authorization, clearance or settlement of electronic debit *transactions*." 15 U.S.C. § 1693o-2(a)(3)(B) (emphasis added). Each of those provisions contrasts starkly with the prohibition on recouping costs that are not "specific" to a "particular" transaction.

The same conclusion follows from the structure of the Durbin Amendment. Congress took care, in directing the Board to establish an interchange fee that is "reasonable and proportional to the costs incurred by the issuer with respect to the transaction," 15 U.S.C. § 1693o-2(a)(2), to mandate that banks could recoup "the incremental cost [of] authorization, clearance, or settlement of a particular electronic debit transaction," but not "other costs incurred by an issuer which are not *specific* to a *particular* electronic debit transaction." *Id.* § 1693o-2(a)(4)(B)(i)-(ii) (emphasis added).

The Rule reads two implausible propositions into that explicit dichotomy. It presumes that Congress impliedly created by silence a third category of costs, and moreover a category over which the Board would have plenary authority. The Rule then expansively interprets this implied category to encompass billions of dollars in annual fixed costs which significantly raise the interchange fee and of which Congress was plainly aware when it required that the fee be capped.[10]

That is not a reasonable reading of the statute. Congress "does not, one might say, hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). The Board has never offered a logical reason why Congress would have gone to the trouble of mandating that banks recover certain costs but not others, while leaving entirely undiscussed such an essential component of the interchange fee. Indeed, as the district court explained, in authorizing recovery of fixed fees, the Board's reading allowed it to contradict the very

[10] *See, e.g.*, Credit Card Fair Fee Act of 2009: Hearing on H.R 2695 Before the H. Judiciary Committee, 111th Cong. 3 (2010) (testimony of John Blum on Behalf of The National Association of Federal Credit Unions), http://judiciary.house.gov/_files/hearings/pdf/Blum100428.pdf (explaining that, prior to Durbin Amendment, interchange fee "help[ed] cover the cost of maintaining the payment system").

purpose of the Durbin Amendment by authorizing banks to charge a *higher* interchange fee than was previously customary for hundreds of millions of small-dollar transactions. *See* App. 101a ("Congress did not empower the Board to make policy judgments that would result in significantly *higher* interchange rates.").

II. THE D.C. CIRCUIT COMMITTED A SIGNIFICANT LEGAL ERROR IN DEFERRING TO THE BOARD.

The D.C. Circuit upheld the Rule's allowance for banks' fixed costs on the ground that the Durbin Amendment calls on the Board to engage in the equivalent of "ratemaking" by requiring it to establish a "reasonable and proportional" maximum interchange fee. App. 30a, 32a-33a. When an agency is engaged in rate-setting, the court reasoned, it receives exceptional deference. *Id.* 30a. The court of appeals sustained the Rule under that highly deferential standard, opining that the Board had engaged in reasonable line-drawing because it would be logistically difficult and potentially arbitrary to draw a distinction between banks' fixed and variable costs. *Id.* 31a-33a. That holding was deeply flawed in multiple respects and conflicts directly with this Court's decisions.

1. Because the Rule is not equivalent to ratemaking, the D.C. Circuit granted the Board far broader deference than it was due. The Board *itself* repeatedly rejected the agency ratemaking paradigm. *See* 76 Fed. Reg. at 43,434; 75 Fed. Reg. at 81,733 n.44. "Public utility rate-setting involves unique circumstances, *none of which* are present in the case of setting standards for interchange transaction fees." 75

Fed. Reg. at 81,733 n.44 (emphasis added). Further, the Durbin Amendment "does not use the term 'just and reasonable' that is typically used in public utility rate-setting statutes." 76 Fed. Reg. at 43,434. "Congress is well aware of this term of art and would have used that phrase had it intended the Board to consider other ratemaking jurisprudence." *Id. See, e.g.*, *Morgan Stanley Capital Grp., Inc.* v. *Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 532 (2008) (courts afford special deference to agency ratemaking principally because the general statutory command to determine "just and reasonable" rates is inherently "incapable of precise definition").

That is no surprise, given that setting a maximum debit card fee bears little resemblance to determining rates for a regulated utility. Among other things, as with the costs related to processing traditional checks, "issuers have other sources, besides interchange fees, from which they can recover revenue to cover their costs of operations and earn a profit." 75 Fed. Reg. at 81,733 n.44. Accordingly, the Board has never argued at any stage of this litigation that it is entitled to the heightened deference applicable to ratemaking proceedings.

Even if an analogy could be drawn to rate-setting, a reviewing court must first resolve the antecedent question of what limits Congress imposed on the Board's authority. As the district court recognized, and the Board itself conceded on appeal, that question is determined under ordinary principles of *Chev-*

ron deference. *See* Resp't's C.A. Br. 15.[11] The Durbin Amendment significantly restricts the Board's authority in setting the "reasonable and proportional" fee, by forbidding the Board from including banks' costs which are not "specific to a particular" transaction. 15 U.S.C. § 1693o-2(a)(4)(B)(ii); *cf. Nat'l Ass'n of Greeting Card Publishers* v. *U.S. Postal Serv.*, 462 U.S. 810, 826 (1983) ("[I]f the statute provides a formula, the agency is bound to follow it."). Congress thus substantially cabined the Board's discretion to consider certain costs and only then permitted the Board to establish a maximum fee that would allow recovery of those costs.

2. For multiple reasons, the Rule is plainly invalid when subjected to the *Chevron* framework. First and foremost, an agency's interpretation is entitled to deference only if it "is not in conflict with the plain language of the statute." *Nat'l R.R. Passenger Corp.* v. *Boston & Me. Corp.*, 503 U.S. 407, 417 (1992). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of

[11] *See, e.g.*, *Aluminum Co. of Am.* v. *Bonneville Power Admin.,* 903 F.2d 585, 590 (9th Cir. 1989) (while noting deference to agency ratemaking, "the courts are the final authorities on issues of statutory construction [and] must reject administrative constructions of a statute that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement"); *Sorenson Commc'ns, Inc.* v. *FCC*, 659 F.3d 1035, 1042-46 (10th Cir. 2011) (separately analyzing statutory interpretation claims under *Chevron* and ratemaking issues under special arbitrary-and-capricious deference).

Congress." *Chevron*, 467 U.S. at 842-43 (footnote omitted). Here, the Durbin Amendment unambiguously forbids banks from recovering their fixed costs through the interchange fee. The D.C. Circuit did not assert that any relevant ambiguity existed. To the contrary, it acknowledged the "persuasive power" of the Durbin Amendment's plain meaning. App. 31a. As detailed in Part I, *supra*—and as the Board recognized in the Notice of Proposed Rulemaking—the phrase "specific to a particular electronic debit transaction" limits the interchange fee costs that arise from "each" transaction. *See supra* 8-9.

Even if this Court were to conclude that the phrase "not specific to a particular . . . transaction" admits of *some* ambiguity, the Board's interpretation still fails. Whatever the precise meaning of the statutory phrase, it cannot mean its *opposite—i.e.,* relating to debit card transactions as a whole. *See, e.g., Rapanos* v. *United States*, 547 U.S. 715, 734 (2006) (plurality) ("The plain language of the [Clean Water Act] does not authorize this 'Land is Waters' approach to federal jurisdiction."). "It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'" *United States* v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1846, n.1 (2012) (Scalia, J., concurring). Thus, the Board's reading would not fall "within the bounds of reasonable interpretation." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013).

3. The Board also is not entitled to deference because its interpretation of the Durbin Amendment is, quite simply, incoherent. The Rule purports to "interpret costs that 'are not specific to a particular electronic debit transaction,' and therefore cannot be

considered by the Board, to mean those costs that are not incurred in the course of effecting any electronic debit transaction." 76 Fed. Reg. at 43,426. In applying that standard, the Board "distinguishe[d] between [permissible] costs incurred in effecting electronic debit transactions and [forbidden] broader program costs." *Id.* at 43,428. The Board reasoned that "no electronic debit transaction can occur without incurring" costs in the former category. *Id.* at 43,427. The latter category excludes costs "incurred without regard to whether, how often, or in what way an electronic debit transaction will occur." *Id.* at 43,428. The Board also deemed it significant in excluding certain costs that they were in part "incurred for activities other than those related to particular electronic debit transactions." *Id.*

The distinctions drawn by the Board are nonsensical. A bank incurs fixed costs well before any debit card transactions occur, not "in the course of effecting" those transactions. Those costs also do not vary with the number of debit card transactions. Indeed, as the Board acknowledged, the particular fixed costs in question are incurred whether or not *any* debit card transactions take place, both because a bank purchases the computers and software apart from the transactions themselves and because a bank "may use the same processing platform for its debit and credit card operations." *See* 76 Fed. Reg. at 43,429. So on the Board's own reasoning, the statute forbids banks from recouping their fixed costs through the interchange fee.

Further, the Board was completely inconsistent in applying those supposed distinctions. For example, at the same time it allowed the recovery of the pro rata portion of "joint" debit network costs shared with credit card transactions, *id.*, it concluded that the statute excludes corporate overhead costs, such as executive compensation and legal and human resources costs, because they were "shared across all product lines of the issuer and are not specific to a particular electronic debit transaction." *Id.* at 43,427. It further determined that the statute forbids banks from recovering "card production and delivery" costs that are similarly indistinguishable from fixed costs: no transaction can occur if customers do not have debit cards; and those costs arise regardless of whether the customers conduct debit card transactions. *Id.* The same is true of the fixed membership fees that banks pay to join debit card networks, which the Board held were also precluded by the statute. *Id.* at 43,428.

The D.C. Circuit itself acknowledged yet another glaring inconsistency in the Board's reading of the statute. The Board permitted banks to recover through the general interchange fee their costs of monitoring individual transactions. 76 Fed. Reg. at 43,430-31. But it excluded banks' *general* costs associated with transaction monitoring as a whole (such as the costs of sending inquiries about suspicious transactions), which it determined were subject to the separate provision of the Durbin Amendment governing fraud prevention costs. *Id.* at 43,431. According to the Board, that differential treatment "reflects the distinction between, on the one hand, section 920(a)(4)(B)'s focus on *a single transaction* and, on the other, section 920(a)(5)(A)(i)'s focus on 'electronic debit *transactions*' involving that issuer." App. 37a-38a (first emphasis added). The latter was properly understood, according to the Board, "'to take into account an issuer's fraud prevention costs over a broad spectrum of transactions that are not linked to a particular transaction.'" App. 38a (quoting Resp't's C.A. Br. 66-67).

But, in permitting banks to recover their fixed costs, the Board rejected that very distinction. It read the much more pointed language of Section 920(a)(4)(B) to *permit* recovery of costs incurred over "'a broad spectrum of transactions.'" *Id.* The D.C. Circuit noted that the Board interpreted "the term 'specific to a particular . . . transaction' as in fact allowing recovery of *many costs* not literally 'specific' to any one 'particular' transaction," including the "costs of hardware, software, and labor." *Id.* (emphasis added). As the court reasoned, banks' fixed costs "seem no more 'specific' to one 'particular' transaction than" the transaction-monitoring costs the Board determined were subject to the statute's separate fraud-related adjustment. *Id.* Thus, the "Board's own interpretation of the statute . . . undermines its justification" for drawing such a distinction. *Id.*

4. Contrary to the ruling below, the Board had no basis to depart from the Durbin Amendment's plain meaning on the ground that it viewed Congress's directive as logistically difficult or potentially arbitrary. It was perfectly sensible for Congress to draw the line set forth in the text. The Durbin Amendment was not enacted to maximize convenience for issuers. On the contrary, it was designed to limit their ability to extract anticompetitive and hidden interchange fees from America's merchants and their customers.

In any event, the Board itself resolved any concerns about arbitrariness or the difficulties of segregating fixed and variable costs. The Rule does not require banks to identify their costs separately in order to recover them. It rejects "issuer-specific interchange fee standards" in favor of a one-size-fits-all statutory cap. *See* 76 Fed. Reg. at 43,423. Every regulated bank is permitted to charge up to twenty-one cents per transaction (plus the additional ad valorem amount) *regardless* of its individual costs. *See id.* at 43,434 ("Issuers that incur the included costs at a level below the interchange fee standard cap . . . may retain the difference between their costs and the cap.").[12]

Even if the logistical concerns posited by the Board were not solved by its own Rule, the Board "may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2446 (2014). As this Court recently admonished the Administration and the D.C. Circuit, while the "power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration,"

[12] The judicially recognized distinction between fixed and variable costs also belies any suggestion that Congress's choice was arbitrary. *See, e.g.*, *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 508 n.25 (2002) ("Variable costs depend on how much of a good is produced, like the cost of copper to make a loop which rises as the loop is made longer; fixed costs, like rent, must be paid in any event without regard to how much is produced.").

it does "not include a power to revise clear statutory terms that turn out not to work in practice." *Id.* at 2446 (citing *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 462 (2002)). An agency thus may not "attempt to soften the clear import of Congress' chosen words" with respect to regulated entities, even when it believes "those words lead to a harsh result." *United States* v. *Locke*, 471 U.S. 84, 95 (1985).

III. THE SURPASSING IMPORTANCE OF THE QUESTION PRESENTED MERITS THIS COURT'S INTERVENTION.

Certiorari is also warranted because this petition presents the Court with the only opportunity to correct the D.C. Circuit's serious error in sustaining the Rule, which otherwise will continue to have widespread consequences for many years. The Rule authorizes the imposition of a substantially inflated interchange fee on debit card transactions. It is applied to more than thirty billion regulated transactions a year.

The Rule governs the conduct of more than eight million different parties—networks, banks, and merchants. *See* 76 Fed. Reg. at 43,395. It specifies the maximum interchange fee for the banks that issue a majority of the debit cards in the country. *See supra* 7 n.6. Banks impose the interchange fee on any person or entity that accepts debit cards. That includes innumerable diverse merchants, from multi-billion-dollar companies to neighborhood dry cleaners, as well as non-merchants such as hospitals and churches.

The cumulative financial effect of the Rule is massive. Petitioners secured an economic analysis of the costs imposed on merchants by the Board's decision to substantially increase the maximum interchange fee in the final Rule over the proposed rule. That report estimates the annual additional cost at $4.04 billion.[13] The substantial majority of that cost—roughly $3 billion annually, in petitioners' estimation—arises from banks' ability under the final Rule to pass their fixed costs on to merchants.

The Rule has serious consequences for American consumers, in turn. Congress and the Board recognized that merchants have little choice but to pass on a substantial portion of the interchange fee to their own customers. *See* 76 Fed. Reg. at 43,460; *see also* App. 7a. That is particularly true for hundreds of thousands of low-margin merchants for which the higher interchange fee threatens to wipe out most or all of the profit on a transaction. Because inflated debit card fees result in higher prices across the board, the economic burden of the Rule is felt not simply every time a consumer swipes a debit card but with virtually every retail transaction.

The Rule's importance will only continue to grow. From 2003 to 2012, the number of debit card transactions tripled—from 15.6 billion to 47 billion annually; between 2009 and 2012, debit card transactions grew at an average rate of almost eight percent annually. *See The 2013 Federal Reserve Payments*

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[13] *See* Robert J. Shapiro, *The Costs and Benefits of Half a Loaf: The Economic Effects of Recent Regulation of Debit Card Interchange Fees* 23-24 (Oct. 1, 2013), http://21353cb4da875d727a1d-ccea4d4b51151ba804c4b0295d8d06a4.r8.cf1.rackcdn.com/SHAPIROreport.pdf.

Study 13 & Ex.5 (Dec. 19, 2013), http://www.frbservices.org/files/communications/pdf/research/2013_payments_study_summary.pdf. It will not be long before there are 100 billion debit card transactions in the United States every year.

If this Court denies review, then the Rule's validity will be finally established. This case, which presents the only challenge to the Rule, is the ideal vehicle to resolve the Rule's validity. Petitioners are a diverse group representing the nation's merchants. For example, petitioner NACS represents roughly 150,000 convenience stores that conduct more than 160 million retail transactions each day, which, in turn, give rise to more than $11 billion in annual payment card costs, with interchange fees constituting the largest proportion. Petitioner National Restaurant Association represents nearly half a million restaurant businesses. Petitioner National Retail Federation represents retailers that pay more than $1 billion in debit interchange fees annually. Petitioner Food Marketing Institute's U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost $770 billion, giving rise to nearly $2 billion in debit interchange fees each year.

The banking community is also very well represented in the case. Recognizing the exceptional importance of the Rule to American banks, the banking industry submitted extensive comments in the administrative proceedings, persuading the Board to reject its proposed rule. In response to petitioners' challenge to the Rule, leading bank trade associations submitted briefs and presented oral argument in both the district court and the court of appeals.

The banking *amici* were, in their own words, "an unprecedented coalition of every major nationwide bank and credit union trade." Mot. of *Amici* The Clearing House Ass'n L.L.C. *et al.* for Leave to Participate in Oral Argument at 1, No. 13-5270 (D.C. Cir. filed Dec. 11, 2013). In addition to the Clearing House Association, that coalition included the American Bankers Association, Consumer Bankers Association, Credit Union National Association, the Financial Services Roundtable, Independent Community Bankers of America, Mid-Size Bank Coalition of America, National Association of Federal Credit Unions, and the National Bankers Association. *See* Brief for *Amici Curiae* The Clearing House Ass'n L.L.C. *et al.* at i-vii, No. 13-5270 (D.C. Cir. filed Oct. 21, 2013).

This Court has repeatedly granted review to ensure the proper implementation and execution of critical regulatory schemes affecting a large portion of the American public. In particular, this case compares favorably with others in which it the Court has reviewed significant administrative rulings by the D.C. Circuit. *See, e.g.*, *Energy-Intensive Mfrs. Working Grp. on Greenhouse Gas Regulation* v. *EPA*, 134 S. Ct. 418 (cert. granted Oct. 15, 2013) (No. 12-1254); *EPA* v. *EME Homer City Generation, L.P.*, 133 S. Ct. 2857 (cert. granted June 24, 2013) (No. 12-1182); *NRG Power Mktg., LLC* v. *Me. PUC,* 556 U.S. 1207 (cert. granted Apr. 27, 2009) (No. 08-674).

This case is no less important and equally deserves this Court's consideration. The D.C. Circuit's approval of the Board's egregious misinterpretation of the Durbin Amendment substantially harms a large swath of American businesses, as well as American consumers, every single day. Certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 18, 2014

APPENDIX

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 17, 2014 Decided March 21, 2014

No. 13-5270

NACS, FORMERLY KNOWN AS NATIONAL ASSOCIATION OF CONVENIENCE STORES, ET AL.,
APPELLEES

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-02075)

Katherine H. Wheatley, Associate General Counsel, Board of Governors of the Federal Reserve System, argued the cause for appellant. With her on the briefs were *Richard M. Ashton*, Deputy General Counsel, *Yvonne F. Mizusawa*, Senior Counsel, and *Joshua P. Chadwick*, Counsel.

Seth P. Waxman argued the cause for *amici curiae* The Clearing House Association, L.L.C., et al. in support of neither party. With him on the brief were *Albinas Prizgintas*, *Noah A. Levine*, and *Alan Schoenfeld*.

Shannen W. Coffin argued the cause for appellees. With him on the brief was *Linda C. Bailey*.

Andrew G. Celli Jr., *Ilann M. Maazel*, and *O. Andrew F. Wilson* were on the brief for *amicus curiae* The Retail Litigation Center, Inc. in support of appellees.

Jeffrey I. Shinder was on the brief for *amici curiae* 7-Eleven, Inc., et al. in support of appellees.

David A. Balto was on the brief for *amicus curiae* United States Senator Richard J. Durbin in support of appellees.

Before: TATEL, *Circuit Judge*, and EDWARDS and WILLIAMS, *Senior Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: Combining features of credit cards and checks, debit cards have become not just the most popular noncash payment method in the United States but also a source of substantial revenue for banks and companies like Visa and MasterCard that own and operate debit card networks. In 2009 alone, debit card holders used their cards 37.6 billion times, completing transactions worth over $1.4 trillion and yielding over $20 billion in fees for banks and networks. Concerned that these fees were excessive and that merchants, who pay the fees directly, and consumers, who pay a portion of the fees indirectly in the form of higher prices, lacked any ability to resist them, Congress included a provision in the Dodd-Frank financial reform act directing the Board of Governors of the Federal Reserve System to address this perceived market failure. In response, the Board issued regulations imposing a cap on the per-transaction fees banks receive and, in an effort to force networks to compete for merchants' business, requiring that at least two networks owned and operated by different companies be able to process transactions on each debit card. Merchant groups challenged the regulations, seeking lower fees and even more network competition. The district court granted summary judgment to the merchants, concluding that the rules violate the statute's plain language. We disagree. Applying traditional tools of statutory interpretation, we hold that the Board's rules generally rest on reasonable constructions of the statute, though we remand one minor issue—the Board's treatment of so-called transactions-monitoring costs—to the Board for further explanation.

I.

Understanding this case requires looking under the hood—or, more accurately, behind the teller's window—to see what really happens when customers use their debit cards. After providing some background about debit cards and the debit card marketplace, we outline Congress's effort to solve several perceived market failures, the Board's attempt to put Congress's directives into action, and the district court's rejection of the Board's approach.

A.

We start with the basics. For purposes of this case, the term "debit card" describes both traditional debit cards, which allow cardholders to deduct money directly from their bank accounts, and prepaid cards, which come loaded with a certain amount of money that cardholders can spend down and, in some cases, replenish. Debit card transactions are typically processed using what is often called a "four party system." The four parties are the cardholder who makes the purchase, the merchant who accepts the debit card payment, the cardholder's bank (called the "issuer" because it issues the debit card to the cardholder), and the merchant's bank (called the "acquirer" because it acquires funds from the cardholder and deposits those funds in the merchant's account). In addition, each debit transaction is processed on a particular debit card "network," often affiliated with MasterCard or Visa. The network transmits information between the cardholder/issuer side of the transaction and the merchant/acquirer side. Issuers activate certain networks on debit cards, and only activated networks can process transactions on those cards.

Virtually all debit card transactions fall into one of two categories: personal identification number (PIN) or signature. PIN and signature transactions employ different methods of "authentication"—a process that establishes that the cardholder, and not a thief, has actually initiated the transaction. In PIN authentication, the cardholder usually enters her PIN into a terminal. In signature authentication, the cardholder usually signs a copy of the receipt. Most networks can process either PIN transactions or signature transactions, but not both. Signature networks employ infrastructure used to process credit card payments, while PIN networks employ infrastructure used by ATMs. Only about one-quarter of merchants currently accept PIN debit. Some merchants have never acquired the terminals needed for customers to enter their PINs, while others believe that signature debit better suits their business needs. More about this later. And merchants who sell online generally refuse to accept PIN debit because customers worry about providing PINs over the Internet. Merchants who do accept both PIN and signature debit often allow customers to select whether to process particular transactions on a PIN network or a signature network.

Whether PIN or signature, a debit card transaction is processed in three stages: authorization, clearance, and settlement. Authorization begins when the cardholder swipes her debit card, which sends an electronic "authorization request" to the acquirer conveying the cardholder's account information and the transaction's value. The acquirer then forwards that request along the network to the issuer. Once the issuer has determined whether the cardholder has sufficient funds in her account to complete the transaction and whether the transaction appears fraudulent, it sends a response to the merchant along the network approving or rejecting the transaction. Even if the issuer approves the transaction, that transaction still must be cleared and settled before any money changes hands.

Clearance constitutes a formal request for payment sent from the merchant on the network to the issuer. PIN transactions are authorized and cleared simultaneously: because the cardholder generally enters her PIN immediately after swiping her card, the authorization request doubles as the clearance message. Signature transactions are first authorized and subsequently cleared: because the cardholder generally signs only after the issuer has approved the transaction, the merchant must send a separate clearance message. This difference between PIN and signature processing explains why certain businesses, including car rental companies, hotels, and sit-down restaurants, often refuse to accept PIN debit. Car rental companies authorize transactions at pick-up to ensure that customers have enough money in their accounts to pay but postpone clearance to allow for the possibility that the customer might damage the vehicle or return it without a full tank of gas. Hotels authorize transactions at check-in but postpone clearance to allow for the possibility that the guest might trash the room, order room service, or abscond with the towels and robes. And sit-down restaurants authorize transactions for the full amount of the meal but postpone clearance to give diners an opportunity to add a tip.

The final debit card payment processing step, settlement, involves the actual transfer of funds from the issuer to the acquirer. After settlement, the cardholder's account has been debited, the merchant's account has been credited, and the transaction has concluded. Rather than settle transactions one-by-one, banks generally employ companies that determine each bank's net debtor/creditor position over a large number of transactions and then settle those transactions simultaneously.

Along the way, and central to this case, the parties charge each other various fees. The issuer charges the acquirer an "interchange fee," sometimes called a "swipe fee," which compensates the issuer for its role in processing the transaction. The network charges both the issuer and the acquirer "network processing fees," otherwise known as "switch fees," which compensate the network for its role in processing the transaction. Finally, the acquirer charges the merchant a "merchant discount," the difference between the transaction's face value and the amount the acquirer actually credits the merchant's account. Because the merchant discount includes the full value of the interchange fee, the acquirer's portion of the network processing fee, other acquirer and network costs, and a markup, merchants end up paying most of the costs acquirers and issuers incur. Merchants in turn pass some of these costs along to consumers in the form of higher prices. In contrast to credit card fees, which generally represent a set percentage of the value of a transaction, debit card fees change little as price increases. Thus, a bookstore might pay the same fees to sell a $25 hardcover that Mercedes would pay to sell a $75,000 car.

Before the Board promulgated the rules challenged in this case, networks and issuers took advantage of three quirks in the debit card market to increase fees without losing much business. First, issuers had complete discretion to decide whether to activate certain networks on their cards. For instance, an issuer could limit payment processing to one Visa signature network, a Visa signature network and a Visa PIN network, or Visa and MasterCard signature and PIN networks. Second, networks had complete discretion to set the level of interchange and network processing fees. Finally, Visa and MasterCard controlled most of the debit card market. According to one study entered into the record, in 2009 networks affiliated with Visa or MasterCard processed over eighty percent of all debit transactions. Steven C. Salop, et al., *Economic Analysis of Debit Card Regulation Under Section 920*, Paper for the Board of Governors of the Federal Reserve System 10 (Oct. 27, 2010). Making things worse for merchants, these companies imposed "Honor All Cards" rules that prohibited merchants from accepting some but not all of their credit cards and signature debit cards. Merchants were therefore stuck paying whatever fees Visa and MasterCard chose to set, unless they refused to accept any Visa and MasterCard credit and signature debit cards—hardly a realistic option for most merchants given the popularity of plastic.

Exercising this market power, issuers and networks often entered into mutually beneficial agreements under which issuers required merchants to route transactions on certain networks that generally charged high processing fees so long as those networks also set high interchange fees. Many of these agreements were exclusive, meaning that issuers agreed to activate only one network or only networks affiliated with one company. Networks and issuers also negotiated routing priority agreements, which forced merchants to process transactions on certain activated networks rather than others. By 2009, interchange and network processing fees had reached, on average, 55.5 cents per transaction, including a 44 cent interchange fee, a 6.5 cent network processing fee charged to the issuer, and a 5 cent network processing fee charged to the acquirer. Debit Card Interchange Fees and Routing, Notice of Proposed Rulemaking ("NPRM"), 75 Fed. Reg. 81,722, 81,725 (Dec. 28, 2010).

B.

Seeking to correct the market defects that were contributing to high and escalating fees, Congress passed the Durbin Amendment as part of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The amendment, which modified the Electronic Funds Transfer Act (EFTA), Pub. L. No. 95-630, 92 Stat. 3641 (1978), contains two key provisions. The first, EFTA section 920(a), restricts the amount of the interchange fee. Specifically, it instructs the Board of Governors of the Federal Reserve System to promulgate regulations ensuring that "the amount of any interchange transaction fee . . . is reasonable and proportional to the cost incurred by the issuer with respect to the transaction." 15 U.S.C. § 1693o-2(a)(3)(A); *see also id.* § 1693o-2(a)(6)–(7)(A) (exempting debit cards issued by banks that, combined with all affiliates, have assets of less than $10 billion and debit cards affiliated with certain government payment programs from interchange fee regulations). To this end, section 920(a)(4)(B), in language the parties hotly debate, requires the Board to "distinguish between . . . the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular debit transaction, which cost shall be considered . . . , [and] other costs incurred by an issuer which are not specific to a particular electronic debit transaction, which costs shall not be considered." *Id.* § 1693o-2(a)(4)(B)(i)-(ii). Like the parties, we shall refer to the costs of "authorization, clearance, and settlement" as "ACS costs." In addition, section 920(a) "allow[s] for an adjustment to the fee amount received or charged by an issuer" to compensate for "costs incurred by the issuer in preventing fraud in relation to electronic debit transactions involving that issuer," so long as the issuer "complies with the fraud-related standards established by the Board." *Id.* § 1693o-2(a)(5)(A).

The second key provision, EFTA section 920(b), prohibits certain exclusivity and routing priority agreements. Specifically, it instructs the Board to promulgate regulations preventing any "issuer or payment card network" from "restrict[ing] the number of payment card networks on which an electronic debit transaction may be processed to . . . 1 such network; or . . . 2 or more [affiliated networks]." *Id.* § 1693o-2(b)(1)(A). It also directs the Board to prescribe regulations that prohibit issuers and networks from "inhibit[ing] the ability of any person who accepts debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions." *Id.* § 1693o-2(b)(1)(B). Congress anticipated that these prohibitions would force networks to compete for merchants' business, thus driving down fees.

C.

In late 2010, the Board proposed rules to implement sections 920(a) and (b). As for section 920(a), the Board proposed allowing issuers to recover only "incremental" ACS costs and interpreted "incremental" ACS costs to mean costs that "vary with the number of transactions" an issuer processes over the course of a year. NPRM, 75 Fed. Reg. at 81,735. Issuers would thus be unable to recover "costs that are common to all debit card transactions and could never be attributed to any *particular* transaction (*i.e.*, fixed costs), even if those costs are specific to debit card transactions as a whole." *Id.* at 81,736. The Board "recognize[d]" that this definition would "impose[] a burden on issuers by requiring issuers to segregate costs that vary with the number of transactions from those that are largely invariant to the number of transactions" and "that excluding fixed costs may prevent issuers from recovering through interchange fees some costs associated with debit card transactions." *Id.* The Board nonetheless determined that other definitions of "incremental cost" "do not appropriately reflect the incremental cost of a particular transaction to which the statute refers." *Id.* at 81,735. Limiting the interchange fee to average variable ACS costs, the Board proposed allowing issuers to recover at most 12 cents per transaction—considerably less than the 44 cents issuers had previously received on average. *Id.* at 81,736–39.

After evaluating thousands of comments, the Board issued a Final Rule that almost doubled the proposed cap. The Board abandoned its proposal to define "incremental" ACS costs to mean average variable ACS costs, deciding instead not to define the term "incremental costs" at all. Debit Card Interchange Fees and Routing, Final Rule ("Final Rule"), 76 Fed. Reg. 43,394, 43,426–27 (July 20, 2011). Observing that "the requirement that one set of costs be considered and another set of costs be excluded suggests that Congress left to the implementing agency discretion to consider costs that fall into neither category to the extent necessary and appropriate to fulfill the purposes of the statute," the Board allowed issuers to recover all costs "other than prohibited costs." *Id.* Thus, in addition to average variable ACS costs, issuers could recover: (1) what the proposed rule had referred to as "fixed" ACS costs; (2) costs issuers incur as a result of transactions-monitoring to prevent fraud; (3) fraud losses, which are costs issuers incur as a result of settling fraudulent transactions; and (4) network processing fees. *Id.* at 43,429–31. The Board prohibited issuers from recovering other costs, such as corporate overhead and debit card production and delivery costs, that the Board determined were not incurred to process specific transactions. *Id.* at 43,427–29. Accounting for all permissible costs, the Board raised the interchange fee cap to 21 cents plus an *ad valorem* component of 5 basis points (.05 percent of a transaction's value) to compensate issuers for fraud losses. *Id.* at 43,404.

In response to section 920(b), the Board's proposed rule outlined two possible approaches.

Under "Alternative A," issuers would have to activate at least two unaffiliated networks on each debit card regardless of method of authentication. NPRM, 75 Fed. Reg. at 81,749. For example, an issuer could activate a Visa signature network and a MasterCard PIN network. Under "Alternative B," issuers would have to activate at least two unaffiliated networks for each method of authentication. *Id.* at 81,749–50. For example, an issuer could activate both Visa and MasterCard signature *and* PIN networks.

In the Final Rule the Board chose Alternative A. Acknowledging that "Alternative A provides merchants fewer routing options," the Board reasoned that it satisfied statutory requirements and advanced Congress's desire to enhance competition among networks without excessively undermining the ability of cardholders to route transactions on their preferred networks or "potentially limit[ing] the development and introduction of new authentication methods." Final Rule, 76 Fed. Reg. at 43,448.

D.

Upset that the Board had nearly doubled the interchange fee cap (as compared to the proposed rule) and had selected the less restrictive anti-exclusivity option, several merchant groups, including NACS, the organization formerly known as the National Association of Convenience Stores, filed suit in district court. The merchants argued that both rules violate the plain terms of the Durbin Amendment: the interchange fee cap because the statute allows issuers to recover only average variable ACS costs, not "fixed" ACS costs, transactions-monitoring costs, fraud losses, or network processing fees; and the anti-exclusivity rule because the statute requires that all merchants—even those who refuse to accept PIN debit—be able to route each debit transaction on multiple unaffiliated networks. Several financial services industry groups, which during rulemaking had urged the Board to set an even higher interchange fee cap and adopt an even less restrictive anti-exclusivity rule, participated as *amici curiae* in support of neither party.

The district court granted summary judgment to the merchants. The court began by observing that "[a]ccording to the Board, [the statute contains] ambiguity that the Board has discretion to resolve. How convenient." *NACS v. Board of Governors of the Federal Reserve System*, 958 F. Supp. 2d 85, 101 (D.D.C. 2013). Rejecting this view, the district court determined that the Durbin Amendment is "clear with regard to what costs the Board may consider in setting the interchange fee standard: Incremental ACS costs of individual transactions incurred by issuers may be considered. That's it!" *Id.* at 105. The district court thus concluded that the Board had erred in allowing issuers to recover "fixed" ACS costs, transactions-monitoring costs, fraud losses, and network processing fees. *Id.* at 105–09. The court also agreed with the merchants that section 920(b) unambiguously requires that all merchants be able to route every transaction on at least two unaffiliated networks. *Id.* at 109–14. The Board's final anti-exclusivity rule, the district court held, "not only fails to carry out Congress's intention; it effectively countermands it!" *Id.* at 112. Concluding that "the Board completely misunderstood the Durbin Amendment's statutory directive and interpreted the law in ways that were clearly foreclosed by Congress," the district court vacated and remanded both the interchange fee rule and the anti-exclusivity rule. *Id.* at 114. But because regulated parties had already "made extensive commitments" in reliance on the Board's rules, the district court stayed vacatur to provide the Board a short period of time in which to promulgate new rules consistent with the statute. *Id.* at 115. Subsequently, the district court granted a stay pending appeal.

The Board now appeals, arguing that both rules rest on reasonable constructions of ambiguous statutory language. Financial services *amici*, urging reversal but still ostensibly appearing in support of neither party, filed a brief and participated in oral argument—though we have considered only those arguments that at least one party has not disavowed. *See Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001) (noting that arguments "rejected by the actual parties to this case" are "not properly before us"); *Eldred v. Ashcroft*, 255 F.3d 849, 854 (D.C. Cir. 2001) (Sentelle, J., dissenting from denial of rehearing en banc) ("Under the panel's holding, it is now the law of this circuit that *amici* are precluded *both* from raising new issues *and* from raising new arguments."). In a case like this, "in which the District Court reviewed an agency action under the [Administrative Procedures Act], we review the administrative action directly, according no particular deference to the judgment of the District Court." *In re Polar Bear Endangered Species Act*

Listing and Section 4(d) Rule Litigation, 720 F.3d 354, 358 (D.C. Cir. 2013) (internal quotation marks omitted). Because the Board has sole discretion to administer the Durbin Amendment, we apply the familiar two-step framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). At Chevron's first step, we consider whether, as the district court concluded, Congress has "directly spoken to the precise question at issue." *Id.* at 842. If not, we proceed to *Chevron's* second step where we determine whether the Board's rules rest on "reasonable" interpretations of the Durbin Amendment. *Id.* at 844.

Before addressing the parties' arguments, we think it worth emphasizing that Congress put the Board, the district court, and us in a real bind. Perhaps unsurprising given that the Durbin Amendment was crafted in conference committee at the eleventh hour, its language is confusing and its structure convoluted. But because neither agencies nor courts have authority to disregard the demands of even poorly drafted legislation, we must do our best to discern Congress's intent and to determine whether the Board's regulations are faithful to it.

II.

We begin with the interchange fee. Recall that section 920(a)(4)(B)(i) *requires* the Board to include "incremental cost[s] incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction," and that section 920(a)(4)(B)(ii) *prohibits* the Board from including "other costs incurred by an issuer which are not specific to a particular electronic debit transaction." Echoing the district court, the merchants argue that the two sections unambiguously permit issuers to recover only "incremental" ACS costs. "The plain language of the Durbin Amendment," the merchants insist, "does not grant the Board the discretion it claims to consider costs beyond those delineated in Section 920(a)(4)(B)." Appellees' Br. 26; *see also NACS*, 958 F. Supp. 2d at 100 (noting that the district court had "*no* difficulty concluding that the statutory language evidences an intent by Congress to bifurcate the entire universe of costs associated with interchange fees"). Alternatively, the merchants briefly argue that even if section 920(a)(4)(B) is ambiguous, the Board's resolution of that ambiguity was unreasonable—though they acknowledge that this argument essentially rehashes their *Chevron* step one argument. *See* Appellees' Br. 44 ("Many of the same arguments discussed above also demonstrate the unreasonableness of the interchange fee standard."). The Board also thinks the Durbin Amendment is unambiguous, though it argues that the statute clearly establishes a third category of costs: those that are not "incremental" ACS costs but are specific to a particular transaction. *See* Final Rule, 76 Fed. Reg. at 43,426 ("[T]here exist costs that are not encompassed in either the set of costs the Board must consider under Section 920(a)(4)(B)(i), or the set of costs the Board may not consider under Section 920(a)(4)(B)(ii)."). Relying on the requirement that the interchange transaction fee be "reasonable and proportional to the cost incurred by the issuer with respect to the transaction," 15 U.S.C. § 1693o-2(a)(2), (a)(3)(A), the Board concludes that it may but need not allow issuers to recover costs falling within this third category, subject of course to other statutory constraints. Like the merchants, the Board also offers a *Chevron* step two argument. *See* Appellant's Br. 71 ("Even assuming for the sake of argument that the district court offered a possible reading, the statute does not unambiguously foreclose the Board's construction . . . .").

The parties' competing arguments present us with two options. Were we to agree with the merchants that the statute allows recovery only of "incremental" ACS costs, we would have to invalidate the rule without considering the particular categories of costs the merchants challenge given that the Board expressly declined to define the ambiguous statutory term "incremental," let alone determine whether those particular types of costs qualify as "incremental" ACS costs. *See Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). Were we to determine that the Board's reading of section 920(a)(4)(B) is either compelled by the statute or reasonable, we would have to go on to consider whether the statute allows recovery of "fixed" ACS costs, transactions-monitoring costs, fraud losses, and network processing fees. We must therefore first decide whether section 920(a)(4)(B) bifurcates the entire universe of costs the Board may consider, or whether the statute allows for the existence of a third category of costs that falls outside the two categories specifically listed.

A.

The Board may well have been able to interpret section 920(a)(4)(B) as the merchants urge. Such a reading could rely on the statutory mandate to "distinguish between" one set of costs and "other costs," and could interpret section 920(a)(4)(B)(i) as referring to variable costs and section 920(a)(4)(B)(ii) as referring to fixed costs. But contrary to the merchants' position, and consistent with the Board's *Chevron* step two argument, we certainly see nothing in the statute's language compelling that result. The merchants' preferred reading requires assuming that the phrase "incremental cost incurred by the issuer for the role of the issuer in the authorization, clearance, and settlement of a particular electronic debit transaction" describes all issuer costs "specific to a particular electronic debit transaction." For several reasons, however, we believe that phrase could just as easily, if not more easily, be read to qualify the language of section 920(a)(4)(B)(i) such that it encompasses a subset of costs specific to a particular transaction, leaving other costs specific to a particular transaction unmentioned.

To begin with, as the Board pointed out in the Final Rule, the phrase "incremental cost" has a several possible definitions, including marginal cost, variable cost, "the cost of producing some increment of output greater than a single unit but less than the entire production run," and "the difference between the cost incurred by a firm if it produces a particular quantity of a good and the cost incurred by the firm if it does not produce the good at all." Final Rule, 76 Fed. Reg. at 43,426–27. As a result, depending on how these terms are defined, the category of "incremental" costs would not necessarily encompass all costs that are "specific to a particular electronic debit transaction." *See infra* at 26 (noting the parties' agreement that the "specific to a particular electronic debit transaction" phrase should not be read to limit issuers to recovering only the marginal cost of each particular transaction).

Second, the phrase "incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction" limits the class of "incremental" costs the Board must consider. So even if the word "incremental" were read to include all costs specific to a particular transaction, Congress left unmentioned incremental costs other than incremental ACS costs. *See* Final Rule, 76 Fed. Reg. at 43,426 n.116 ("The reference in Section 920(a)(4)(B)(i) requiring consideration of the incremental costs incurred in the 'authorization, clearance, or settlement of a particular transaction' and the reference in section 920(a)(4)(B)(ii) prohibiting consideration of costs that are 'not specific to a particular electronic debit transaction,' read together, recognize that there may be costs that are specific to a particular electronic debit transaction that are not incurred in the authorization, clearance, or settlement of that transaction."). For example, in the proposed rule the Board determined that "cardholder rewards that are paid by the issuer to the cardholder for each transaction" and "costs associated with providing customer service to cardholders for particular transactions" are "associated with a particular transaction" but "are not incurred by the issuer for its role in authorization, clearing, and settlement of that transaction." NPRM, 75 Fed. Reg. at 81,735. Moreover, in the Final Rule the Board explained that fraud losses "are specific to a particular transaction" because they result from the settlement of particular fraudulent transactions, but are not incurred by the issuer for the role of the issuer in the authorization, clearance, or settlement of particular transactions. Final Rule, 76 Fed. Reg. at 43,431 (describing fraud losses as "the result of an issuer's authorization, clearance, or settlement of a particular electronic debit transaction that the cardholder later identifies as fraudulent"); *see also* Appellant's Br. 67 (defending the Board's decision to allow issuers to recover some fraud losses on the ground that fraud losses fall outside section 920(a)(4)(B)).

Third, as the Board pointed out, had Congress wanted to allow issuers to recover only incremental ACS costs, it could have done so directly. *See* Final Rule, 76 Fed. Reg. at 43,426. For instance, in section 920(a)(3)(A) Congress could have instructed the Board to "promulgate regulations ensuring that interchange fees are reasonable and proportional to the incremental costs of authorization, clearance, and settlement that an issuer incurs with respect to a particular electronic debit transaction." Instead, in section 920(a)(3)(A) Congress required the Board to promulgate regulations ensuring that interchange fees are "reasonable and proportional to the cost incurred by the issuer with respect to the transaction" and separately instructed the Board, when determining issuer costs, to "distinguish between" incremental ACS costs, which the Board must consider, 15 U.S.C. § 1693o-2(a)(4)(B)(i), and "other costs . . . which are not specific to a particular electronic debit transaction," which the Board must not consider, *id.* § 1693o-2(a)(4)(B)(ii).

The merchants advance several arguments in support of the opposite conclusion. They first assert that the "which" clause in the phrase "other costs incurred by an issuer which are not specific to a particular electronic debit transaction" should be read descriptively rather than restrictively. As their labels suggest, descriptive clauses explain, while restrictive clauses define. To illustrate, consider a simple sentence: "the cars which are blue have sunroofs." Read descriptively, the clause "which are blue" states a fact about the entire class of cars, which also happen to have sunroofs. Read restrictively, the clause defines a particular class of cars—blue cars—all of which have sunroofs. Although often subtle, the distinction between descriptive and restrictive clauses makes all the difference in this case. Here's why.

We have thus far assumed that section 920(a)(4)(B)(ii)'s "which" clause should be read restrictively. On this reading (the Board's), the clause defines the class of "other costs" issuers are precluded from recovering. As explained above, based on this restrictive reading the Board reasonably concluded that the statute establishes three categories of costs. But if the clause should instead be read descriptively, then it would describe a characteristic of "other costs" without limiting the meaning of "other costs." On this reading (the merchants'), the statute bifurcates the entire universe of costs, requiring the Board to define the statutory term "incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction" as including all costs other than costs "not specific to a particular electronic debit transaction."

Normally, writers distinguish between descriptive and restrictive clauses by setting the former but not the latter aside with commas and by introducing the former with "which" and the latter with "that." Here, Congress introduced the clause at issue with the word "which" but failed to set it aside with commas. Word choice thus suggests a descriptive reading of the clause, while punctuation suggests a restrictive reading. In support of a descriptive reading, the merchants rely on a ninety-year-old Supreme Court case for the proposition that "[p]unctuation is a minor, and not a controlling, element in interpretation." *Barrett v. Van Pelt*, 268 U.S. 86, 91 (1925); *see also* NACS, 958 F. Supp. 2d at 102 (calling Congress's failure to use commas a "red herring"). This decision provides the merchants little help. Not only was it written long before the development of modern approaches to statutory interpretation, *see U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 454–55 (1993) (noting that although reliance on punctuation must not "distort[] a statute's true meaning," "[a] statute's plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation"), but it addressed statutory language that, unlike here, contained a clearly misplaced comma, *Barrett*, 268 U.S. at 88 (interpreting a statute "so inapt and defective that it is difficult to give it a construction that is wholly satisfactory" without ignoring its comma).

The idea that we should entirely ignore punctuation would make English teachers cringe. Even if punctuation is sometimes a minor element in interpreting the meaning of language, punctuation is often crucial—a reader might appropriately gloss over a comma mistakenly inserted between a noun and a verb yet pay extra attention to a comma or semicolon setting off separate items in a list. Following the merchants' advice and stuffing punctuation to the bottom of the interpretive toolbox would run the risk of distorting the meaning of statutory language. After all, Congress communicates through written language, and one component of written language is grammar, including punctuation. As *Strunk and White* puts it, "the best writers sometimes disregard the rules of rhetoric. When they do so, however, the reader will usually find in the sentence some compensating merit, attained at the cost of the violation. Unless he is certain of doing as well, he will probably do best to follow the rules." WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE xvii–xviii (4th ed. 2000) (internal quotation marks omitted). Put another way, "all our thoughts can be rendered with absolute clarity if we bother to put the right dots and squiggles between the words in the right places." LYNN TRUSS, EATS, SHOOTS & LEAVES 201–02 (2003).

In this instance, the absence of commas matters far more than Congress's use of the word "which" rather than "that." Widely-respected style guides expressly require that commas set off descriptive clauses, but refer to descriptive "which" and restrictive "that" as a style preference rather than an ironclad grammatical rule. As *The Chicago Manual of Style* explains:

> A relative clause that is restrictive—that is, essential to the meaning of the sentence—is neither preceded nor followed by a comma. But a relative clause that could be omitted without essential loss of meaning (a nonrestrictive clause) should be both preceded and (if the sentence continues) followed by a comma. Although *which* can be used restrictively, many careful writers preserve the distinction between restrictive *that* (no commas) and descriptive *which* (commas).

THE CHICAGO MANUAL OF STYLE 250 (14th ed. 2003). *Compare* STRUNK & WHITE at 3–4 ("Nonrestrictive relative clauses are parenthetic. . . . Commas are therefore needed."), *and* WILSON FOLLETT, MODERN AMERICAN USAGE: A GUIDE 69 (Erik Wensberg ed., 1998) (same), *with* STRUNK & WHITE at 59 ("The use of *which* for *that* is common in written and spoken language. . . . Occasionally *which* seems preferable to *that* . . . But it would be a convenience to all if these two pronouns were used with precision."), *and* FOLLETT at 293 ("The alert reader will notice that quite a few excellent authors decline to use *that* and *which* in precisely the ways that late-twentieth-century grammar books recommend.”).

In fact, elsewhere in the Durbin Amendment Congress demonstrated that it is among those writers who ignore the distinction between descriptive “which” and restrictive “that.” In section 920(b)(1)(A), for example, Congress instructed the Board to prevent networks and issuers from activating on a debit card only one network or “2 or more such networks *which* are owned, controlled, or otherwise operated by” the same company. 15 U.S.C. § 1693o-2(b)(1)(A)(i)-(ii) (emphasis added). Even though Congress used the word “which” to introduce this clause, the clause is clearly restrictive. A descriptive reading would require that the Board prevent issuers and networks from ever activating “one network” or “2 or more such networks.” In other words, a descriptive reading would prevent the activation of any networks at all, rendering debit cards useless chunks of plastic. *Cf. Barnhart v. Thomas*, 540 U.S. 20, 24 (2003) (finding a restrictive clause in the statutory phrase “any other kind of substantial gainful work which exists in the national economy”). By contrast, in the Durbin Amendment Congress set aside every clearly descriptive clause with commas. *See, e.g.*, 15 U.S.C. § 1693o-2(a)(4)(B)(ii) (“other costs incurred by an issuer which are not specific to a particular electronic debit transaction, *which* costs shall not be considered under paragraph (2)” (emphasis added)).

The merchants also emphasize Congress’s use of the terms “distinguish between,” 15 U.S.C. § 1693o-2(a)(4)(B), and “other costs,” *id.* § 1693o-2(a)(4)(B)(ii).

According to the merchants, the term "distinguish between" suggests that Congress required the Board to "differentiate [between] the two categories of costs," and "the very use of the term 'other costs'—as opposed to simply 'costs'—indicates the entire universe of costs that is remaining after consideration of includable costs." Appellees' Br. 28. As noted above, these terms might provide some textual support for the merchants' preferred reading of the statute. But given the Board's reasonable determination that issuers incur costs, other than incremental ACS costs, that are "specific to a particular transaction," the terms "distinguish between" and "other costs" hardly compel the conclusion that the Board must interpret section 920(a)(4)(B) as encompassing all costs that issuers incur. Imagine that you make a deal to hand over part of your baseball card collection and to distinguish between rookie cards, which you must hand over, and other cards less than five years old, which you must not. Although it would probably make little financial sense, you could certainly hand over a 1960 Harmon Killebrew Topps card without violating the terms of the deal.

Next, the merchants assert that the Board, by inferring the existence of a third category of costs, improperly reads a delegation of authority into congressional silence. According to the merchants, "Congress would not delineate with specificity the characteristics of includable costs (e.g., incremental) if it intended, by its silence, to allow the Board to consider and include *their opposite* (*e.g.*, nonincremental)." Appellees' Br. 31; *accord American Petroleum Institute v. Environmental Protection*

Agency, 198 F.3d 275, 278 (D.C. Cir. 2000) ("[I]f Congress makes an explicit provision for apples, oranges and bananas, it is most unlikely to have meant grapefruit."). But section 920(a)(3)(A) clearly grants the Board authority to promulgate regulations ensuring that interchange fees are reasonable and proportional to costs issuers incur. The question then is how section 920(a)(4)(B) limits the Board's discretion to define the statutory term "cost incurred by the issuer with respect to the transaction," not whether that section affirmatively grants the Board authority to allow issuers to recover certain costs.

Finally, in a footnote the merchants point to section 920(a)(3)(B)'s requirement that the Board disclose certain ACS cost information and to section 920(a)(4)(A)'s requirement that the Board "consider the functional similarity between electronic debit transactions and checking transactions that are required within the Federal Reserve bank system to clear at par." The district court relied heavily on these provisions, concluding that Congress's decisions to limit disclosure "to the same costs specified in section (a)(4)(B)(i)" and to direct the Board to consider similarities, but not differences, between checks and debit cards support the merchants' interpretation of the statute. *NACS*, 958 F. Supp. 2d at 103–04. But even assuming the disclosure provision mirrors section 920(a)(4)(B)(i)'s reference to incremental ACS costs—the word "incremental" appears nowhere in the disclosure provision—the statute also allows the Board to collect "such information as may be necessary to carry out the provisions of this section," not just information about incremental ACS costs. 15 U.S.C. § 1693o-2(a)(3)(B). Similarly, Congress's instruction to the Board to "consider the functional similarity between electronic debit transactions and checking transactions" hardly precludes the Board from considering differences as well. Doing just that, the Board decided that it could allow banks to recover some costs in the debit card context that they are unable to recover in the checking context.

Given the Durbin Amendment's ambiguity as to the existence of a third category of costs, we must defer to the Board's reasonable determination that the statute splits costs into three categories: (1) incremental ACS costs, which the Board must allow issuers to recover; (2) costs specific to a particular transaction, other than incremental ACS costs, which the Board may, but need not, allow issuers to recover; and (3) costs not specific to a particular transaction, which the Board may not allow issuers to recover. *See Chevron*, 467 U.S. at 843 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

B.

Because the Board reasonably interpreted the Durbin Amendment as allowing issuers to recover some costs in addition to incremental ACS costs, we must now determine whether the Board reasonably concluded that issuers can recover the four specific types of costs the merchants challenge: "fixed" ACS costs, network processing fees, fraud losses, and transactions-monitoring costs. Much like agency ratemaking, determining whether issuers or merchants should bear certain costs is "far from an exact science and involves policy determinations in which the [Board] is acknowledged to have expertise." *Time Warner Entertainment Co. v. Federal Communications Commission*, 56 F.3d 151, 163 (D.C. Cir. 1995) (internal quotation marks omitted). We afford agencies special deference when they make these sorts of determinations. *See, e.g., BNSF Railway Co. v. Surface Transportation Board*, 526 F.3d 770, 774 (D.C. Cir. 2008) ("In the rate-making area, our review is particularly deferential, as the Board is the expert body Congress has designated to weigh the many factors at issue when assessing whether a rate is just and reasonable."); *Time Warner*, 56 F.3d at 163. With that caution in mind, we address each category of costs.

"Fixed" ACS Costs

Microeconomics textbooks draw a clear distinction between "fixed" and "variable" costs: fixed costs are incurred regardless of transaction volume, whereas variable costs change as transaction volume increases. *E.g.*, N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 276–77 (3d ed. 2004). The merchants, noting that the statute precludes recovery of costs "not specific to a particular . . . transaction," 15 U.S.C. § 1693o-2(a)(4)(B)(ii), argue that the Board's Final Rule improperly allows recovery of fixed costs such as "equipment, hardware and software." Appellees' Br. 35. "By definition," the merchants declare, "fixed costs are not 'specific' to any 'particular' transaction and fall squarely within the statute's excludable costs provision." *Id.* at 39. The merchants therefore urge us to require the Board to return to something along the lines of its proposed rule, under which merchants could only recover average variable ACS costs.

The merchants' argument certainly has some persuasive power. One might think it a stretch if a shoe store claimed that the rent it pays its landlord is somehow "specific" to a "particular" shoe sale. But the merchants have never argued that issuers should be allowed to recover only costs incurred as a result of processing individual, isolated transactions. *See* NPRM, 75 Fed. Reg. at 81,736 (requesting comment about whether "costs should be limited to the marginal cost of a transaction"); Final Rule, 76 Fed. Reg. at 43,427 n.118 (noting that "[t]he Board did not receive comments regarding the use of marginal cost"). Indeed, the Board's proposed rule, which the merchants seem to endorse, would have allowed recovery of costs that are variable over the course of a year but could not be traced to any one particular transaction.

We think the Board reasonably declined to read section 920(a)(4)(B) as preventing issuers from recovering "fixed" costs. As the Board pointed out, the distinction the merchants urge between what they refer to as non-includable "fixed" costs and includable "variable" costs depends entirely on whether, on an issuer-by-issuer basis, certain costs happen to vary based on transaction volume in a particular year. For example, in any given year one issuer might classify labor as an includable cost because labor costs happened to vary based on transaction volume over that year, while another issuer might classify labor as a non-includable cost because such costs happened to remain fixed over that year. *See* Final Rule, 76 Fed. Reg. at 43,427. Moreover, the Board pointed out, the distinction between variable and fixed ACS costs depends in some instances on whether an issuer "performs its transactions processing in-house" or "outsource[s] its debit card operations to a third-party processor that charge[s] issuers a per-transaction fee based on its entire cost." *Id.* In any event, the Board concluded, requiring issuers to segregate includable "variable" costs from excludable "fixed" costs on a year-by-year basis would prove "exceedingly difficult for issuers . . . [because] even if a clear line could be drawn between an issuer's costs that are variable and those that are fixed, issuers' cost-accounting systems are not generally set up to differentiate between fixed and variable costs." *Id.* The Board therefore determined that any distinction between fixed and variable costs would prove artificial and unworkable.

Instead, pointing out that the statute requires interchange fees to be "reasonable and proportional" to issuer costs, the Board interpreted section 920(a)(4)(B) as allowing issuers to recover costs they must incur in order to effectuate particular electronic debit card transactions but precluding them from recovering other costs too remote from the processing of actual transactions. "This reading interpret[s] costs that 'are not specific to a particular electronic debit transaction,' and . . . cannot be considered by the Board, to mean those costs that are not incurred in the course of effecting any electronic debit transaction." *Id.* at 43,426. In our view, the Board reasonably distinguished between costs issuers could recover and those they could not recover on the basis of whether those costs are "incurred in the course of effecting" transactions. *Id.* For instance, the Board's rule allows issuers to recover equipment, hardware, software, and labor costs since "[e]ach transaction uses the equipment, hardware, software and associated labor, and no particular transaction can occur without incurring these costs." *Id.* at 43,430. By contrast, the rule precludes issuers from recovering the costs of producing and distributing debit cards because "an issuer's card production and delivery costs . . . are incurred without regard to whether, how often, or in what way an electronic debit transaction will occur." *Id.* at 43,428. Given the Board's expertise, we see no basis for upsetting its reasonable line-drawing. *See ExxonMobil Gas Marketing Co. v. Federal Energy Regulatory Commission*, 297 F.3d 1071, 1085 (D.C. Cir. 2002) ("We are generally unwilling to review line-drawing . . . unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem." (internal quotation marks omitted)).

Network Processing Fees

This is easy. Network processing fees, which issuers pay on a per-transaction basis, are obviously specific to particular transactions. The merchants argue that allowing issuers to recover network processing fees through the interchange fee would run afoul of section 920(a)(8)(B), which requires the

Board to ensure that "a network fee is not used to directly or indirectly compensate an issuer with respect to an electronic debit transaction." Perhaps signaling that even the merchants are not entirely confident about this argument, they present it only in a footnote. The merchants should have left it out entirely. As the Board points out, section 920(a)(8)(B) is designed to prevent issuers and networks from circumventing the Board's interchange fee rules, not to prevent issuers from recovering reasonable network processing fees through the interchange fee. Final Rule, 76 Fed. Reg. at 43,442 ("[Section 920(a)(8)(B)] authorizes the Board to prescribe rules to prevent circumvention or evasion of the interchange transaction fee standards.").

Fraud Losses

The merchants nowhere challenge the Board's conclusion that fraud losses, which result from the settlement of particular fraudulent transactions, are specific to those transactions. The only question is whether a separate provision of the Durbin Amendment—section 920(a)(5)'s fraud-prevention adjustment, which allows issuers to recover fraud-prevention costs if those issuers comply with the Board's fraud-prevention standards—precludes the Board from allowing issuers to recover fraud losses as part of section 920(a)(2)'s "reasonable and proportional" interchange fee. The merchants claim that it does.

First, noting that Congress intended the fraud-prevention adjustment to be the only "fraud-related adjustment of the issuer," 15 U.S.C. § 1693o-

2(a)(5)(A)(ii)(I), the merchants argue that the Board should have allowed issuers to recover fraud-related costs only through the fraud-prevention adjustment. We disagree. The Board determined—reasonably in our view—that because fraud losses result from the *failure* of fraud-prevention, they do not themselves qualify as fraud-prevention costs. *See* Final Rule, 76 Fed. Reg. at 43,431 ("An issuer may experience losses for fraud that it cannot prevent and cannot charge back to the acquirer or recoup from the cardholder."). And nothing in the statute suggests that Congress used the word "adjustment" to describe the process of determining which costs issuers should be allowed to recover directly through the interchange fee. Rather, when discussing the fraud-prevention adjustment, Congress empowered the Board to "allow for an adjustment to the fee amount received or charged by an issuer under paragraph (2)." 15 U.S.C. § 1693o-2(a)(5)(A). Paragraph (2), in turn, requires that the interchange fee be "reasonable and proportional" to costs incurred by issuers. *Id.* § 1693o-2(a)(2). Thus, Congress used the word "adjustment" to describe a bonus over and above the "reasonable and proportional" interchange fee.

The merchants next maintain that allowing issuers to recover fraud losses through the interchange fee "irrespective of any particular bank's efforts to reduce fraud" would undermine Congress's decision to condition receipt of the fraud-prevention adjustment on compliance with the Board's fraud-prevention standards. Appellees' Br. 43. Even assuming the merchants' policy argument has some merit—allowing recovery of fraud losses regardless of compliance with fraud-prevention standards might well decrease issuers' incentives to invest in fraud prevention—the Board rejected it, reasoning that "[i]ssuers will continue to bear the cost of some fraud losses and cardholders will continue to demand protection against fraud." Final Rule, 76 Fed. Reg. at 43,431. Such policy judgments are the province of the Board, not this Court. *See Village of Barrington, Illinois v. Surface Transportation Board*, 636 F.3d 650, 666 (D.C. Cir. 2011) ("As long as the agency stays within [Congress's] delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference." (internal quotation marks omitted) (alterations in original)).

Transactions-Monitoring Costs

The Board acknowledged in the Final Rule that transactions-monitoring costs, unlike fraud losses, are the paradigmatic example of fraud-prevention costs. Final Rule, 76 Fed. Reg. at 43,397 ("The most commonly reported fraud prevention activity was transaction monitoring."). The Board then distinguished between "[t]ransactions monitoring systems [that] assist in the authorization process by providing information to the issuer before the issuer decides to approve or decline the transaction," which the Board placed outside the fraud-prevention adjustment, and "fraud-prevention activities . . . that prevent fraud with respect to transactions at times other than when the issuer is effecting the transaction"—for instance the cost of sending "cardholder alerts . . . inquir[ing] about suspicious activity"—which the Board determined should be "considered in connection with the fraud-prevention adjustment." *Id.* at 43,430–31. Challenging this distinction, the merchants think it "preposterous to suggest that Congress would *specifically address* the costs associated with fraud prevention in a separate provision of the statute, condition the recovery of those costs on an issuer's compliance with fraud prevention measures, and then . . . permit recovery of those very same costs" whether or not an issuer complies with fraud-prevention standards. Appellees' Br. 41.

As an initial matter, we agree with the Board that transactions-monitoring costs can reasonably qualify both as costs "specific to a particular . . . transaction" (section 920(a)(4)(B)) and as fraud-prevention costs (section 920(a)(5)). Thus, the Board may have discretion either to allow issuers to recover transactions-monitoring costs through the interchange fee regardless of compliance with fraud-prevention standards or to preclude issuers from recovering transactions-monitoring costs unless those issuers comply with fraud-prevention standards. That said, "an agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 48 (1983). We agree with the merchants that the Board has fallen short of that standard.

The Board insists that the distinction it drew between fraud-prevention costs falling outside the fraud-prevention adjustment and fraud-prevention costs falling within it reflects the distinction between, on the one hand, section 920(a)(4)(B)'s focus on a single transaction and, on the other, section 920(a)(5)(A)(i)'s focus on "electronic debit *transactions* involving that issuer." According to the Board, Congress "intended the . . . fraud-prevention adjustment to take into account an issuer's fraud prevention costs over a broad spectrum of transactions that are not linked to a particular transaction." Appellant's Br. 66–67. But as noted above, the Board interpreted the term "specific to a particular . . . transaction" as in fact allowing recovery of many costs not literally "specific" to any one "particular" transaction. *See supra* at 26–28. The costs of hardware, software, and labor seem no more "specific" to one "particular" transaction than many of the fraud-prevention costs the Board determined fall within the fraud prevention adjustment. The Board's own interpretation of the statute thus undermines its justification for concluding that Congress established a fraud-prevention adjustment, conditioned receipt of that adjustment on compliance with fraud-prevention standards, yet allowed issuers to recover the paradigmatic example of fraud-prevention costs—transactions-monitoring costs—whether or not issuers comply with those standards.

All that said, the Board may well be able to articulate a reasonable justification for determining that transactions-monitoring costs properly fall outside the fraud-prevention adjustment. But the Board has yet to do so. "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or *if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record* *before it*, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (emphasis added). We shall do so here. Because the interchange fee rule generally rests on a reasonable interpretation of the statute, because the Board may well be able to articulate a sufficient explanation for its treatment of fraud-prevention costs, and because vacatur of the rule would be disruptive—the merchants seek an even lower interchange fee cap, but vacating the Board's rule would lead to an entirely unregulated market, allowing the average interchange fee to once again reach or exceed 44 cents per transaction—we see no need to vacate. *See Heartland Regional Medical Center v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) (noting that remand without vacatur is warranted "[w]hen an agency may be able readily to cure a defect in its explanation of a decision" and the "disruptive effect of vacatur" is high); *see also, e.g., Environmental Defense Fund v. Environmental Protection Agency*, 898 F.2d 183, 190 (D.C. Cir. 1990) (instructing that courts should ordinarily remand without vacatur when vacatur would "at least temporarily defeat" the interests of the party successfully seeking remand).

III.

Having resolved the merchants' challenges to the interchange fee rule, we turn to the anti-exclusivity rule. As explained above, *see supra* at 9, section 920(b) requires the Board to promulgate regulations preventing "an issuer or payment card network" from "restrict[ing] the number of payment card networks on which an electronic debit transaction may be processed" to a single network, or to networks affiliated with one another. In the proposed rule, the Board outlined two alternatives: require issuers and networks to activate two unaffiliated networks or two unaffiliated networks for each method of authentication. In the Final Rule, the Board chose the former, requiring activation of two unaffiliated networks on each debit card regardless of method of authentication.

The merchants believe that the Durbin Amendment unambiguously requires that all merchants have multiple unaffiliated network routing options for each debit transaction. *See NACS*, 958 F. Supp. 2d at 109–12 (accepting this argument). Arguing that the Board's rule flunks this requirement, the merchants emphasize two undisputed facts. First, given that most merchants refuse to accept PIN debit, many transactions can currently be processed only on signature debit. Second, cardholders, not merchants, often have the ability to select whether to process transactions on signature networks or PIN networks. As a result, the merchants emphasize, under the Board's rule many merchants will still lack the ability to choose between unaffiliated networks when deciding how to process particular transactions. Disputing none of this, the Board points out that all merchants *could* accept PIN debit even if some choose not to and emphasizes that the statute is silent about "restrictions imposed by merchants or consumers that limit routing choice." Appellant's Br. 22. Given the parties' agreement that under the Board's rule some merchants will lack routing choice for particular transactions, we must determine whether the statute requires that all merchants—even those who voluntarily choose not to accept PIN debit—have the ability to decide between unaffiliated networks when routing transactions.

The merchants have a steep hill to climb. Congress directed the Board to issue rules that would accomplish a particular objective, leaving it to the Board to decide how best to do so, and the Board's rule seems to comply perfectly with Congress's command. Under the rule, "issuer[s] and payment card network[s]" cannot "restrict the number of payment card networks on which an electronic debit transaction may be processed" to only affiliated networks—exactly what the statute requires. 15 U.S.C. § 1693o-2(b)(1)(A).

Undaunted, the merchants emphasize one largely conclusory textual argument and allude to another. First, relying on the statutory phrase "electronic debit transaction," *id.* § 1693o-2(b)(1)(A), they maintain that the statute plainly "requires the Board to ensure that merchants be afforded a choice of networks for *each debit transaction*." Appellees' Br. 45. But context matters. Relying on the statute's reference to "issuer[s] and payment card network[s]," the Board reasonably read the "electronic debit transactions" phrase to prevent issuers and networks, prior to instigation of any particular debit transaction, from limiting the number of networks "on which *an* electronic debit transaction *may* be processed" to only affiliated networks. 15 U.S.C. § 1693o-2(b)(1)(A) (emphasis added).

In a footnote, the merchants repeat, though they seem not to embrace, a textual argument on which the district court relied. Looking to the statutory definitions of "electronic debit transaction" ("a transaction in which a person uses a debit card") and of "debit card" ("any card . . . issued or approved for use through a payment card network to debit an asset account . . . whether authorization is based on signature, PIN, or other means"), *id.* § 1693o-2(c)(2), (c)(5), the district court ruled that the statutory term "electronic debit transaction" requires that issuers and networks activate multiple unaffiliated networks for each transaction "whether authorization is based on signature, PIN, or other means," NACS, 958 F. Supp. 2d at 110–11. But we think it quite implausible that Congress engaged in a high-stakes game of hide-and-seek with the Board, writing a provision that seems to require one thing but embedding a substantially different and, according to financial services *amici*, much more costly requirement in the statute's definitions section. *Cf. Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001) ("Congress . . . does not . . . hide elephants in mouseholes.").

The merchants also argue that the Board's rule runs afoul of the Durbin Amendment's purpose. Pointing out that Congress intended network competition to drive down network processing fees, the merchants insist that the Board has undermined this competitive market because "merchants will be deprived of network choice for a substantial segment of debit transactions in the marketplace today." Appellees' Br. 47. But the Board thought differently. As it explained in the Final Rule, "merchants that currently accept PIN debit would have routing choice with respect to PIN debit transactions in many cases where an issuer chooses to participate in multiple PIN debit networks." Final Rule, 76 Fed. Reg. at 43,448. Indeed, the Board presents uncontested evidence demonstrating that its rule has, as predicted, substantially increased network competition. According to the Board, as a result of the rule over 100 million debit cards were activated on new networks, and "[Visa], which had previously accounted for approximately 50-60% of the [PIN debit] market, lost roughly half that share." Appellant's Br. 37 & n.6 (internal quotation marks omitted).

Of course, as the Board acknowledges, the merchants' preferred rule would result in *more* competition. But in its Final Rule the Board explained the policy considerations that led it to reject that approach. For one thing, cardholders might prefer to route transactions over certain networks, perhaps because they believe those networks to have better fraud-prevention policies. Final Rule, 76 Fed. Reg. at 43,447–48. Also, the merchants' preferred rule "could potentially limit the development and introduction of new authentication methods" since issuers would be unable to compel merchants to accept new authentication techniques. Final Rule, 76 Fed. Reg. at 43,448. The merchants ignore these reasonable concerns. Given that the Board's rule advances the Durbin Amendment's purpose, we decline to second-guess its reasoned decision to reject an alternative option that might have further advanced that purpose.

Next, the merchants emphasize the interaction between section 920(b)'s two key components: the anti-exclusivity and routing priority provisions. According to the merchants, the Board's anti-exclusivity rule renders the routing priority provision meaningless, since merchants will often lack the ability to choose between multiple unaffiliated routing options. But as the Board points out, the merchants misunderstand the routing priority provision. Recall that it prohibits issuers and networks from requiring merchants to process transactions over certain activated networks rather than others. Far from rendering the routing priority provision a nullity, the Board's anti-exclusivity provision would be ineffective without it. Absent the routing priority provision, issuers and networks could, for instance, activate two PIN networks and a signature network affiliated with one of the PIN networks and then require merchants to route transactions over the PIN network affiliated with the signature network rather than over the other PIN network.

Finally, the merchants question the Board's premise that it is they, not issuers and networks, who restrict routing options for transactions under the Board's Final Rule. To this end, they assert that issuer and network rules arbitrarily prevent merchants from processing PIN transactions on signature networks and vice versa, suggesting that the Board could comply with the statute by eliminating the distinction between PIN and signature debit. But even if issuers and networks are responsible for maintaining this distinction—a point they strongly dispute—merchants, not issuers or networks, limit their own options when they refuse to accept PIN debit, and cardholders, not issuers or networks, limit merchants' options when given the ability to choose how to process transactions. "The principal fallacy with the Merchants' argument," the Board aptly explains, "is that they selectively view transactions only from their own perspective and only *after* the point at which the merchant itself or the consumer may have elected to restrict certain routing options," whereas "section 920(b) speaks only in terms of *issuer* and *payment card network* restrictions" imposed prior to initiation of any particular debit card transaction. Reply Br. 2–3.

In sum, far from summiting the steep hill, the merchants have barely left basecamp. We therefore defer to the Board's reasonable interpretation of section 920(b) and reject the merchants' challenges to the anti-exclusivity rule.

IV.

For the foregoing reasons, we reverse the district court's grant of summary judgment to the merchants and remand for further proceedings consistent with this opinion.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NACS; NATIONAL RETAIL FEDERATION; FOOD MARKETING INSTITUTE; MILLER OIL CO.; BOSCOV'S DEPARTMENT STORE, LLC; and NATIONAL RESTAURANT ASSOCIATION, Plaintiffs, v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, Defendant. [handwritten note omitted]	)	Civil Case No. 11-02075 (RJL)

<u>MEMORANDUM OPINION</u>
July 31, 2013 [Dkts. ##20, 23]

Plaintiffs NACS (formerly, the National Association of Convenience Stores), National Retail Federation ("NRF"), Food Marketing Institute ("FMI"), Miller Oil Co., Inc. ("Miller"), Boscov's Department Store, LLC ("Boscov's) and National Restaurant Association ("NRA") (collectively, "plaintiffs") bring this action against the Board of Governors of the Federal Reserve System ("defendant" or "the Board") to overturn the Board's Final Rule setting standards for debit card interchange transaction fees ("interchange fees") and network exclusivity prohibitions. Before the Court are the parties' cross-motions for summary judgment [Dkts. ##20, 23]. Upon consideration of the pleadings, oral argument, and the entire record therein, the Court concludes that the Board has clearly disregarded Congress's statutory intent by inappropriately inflating all debit card transaction fees by billions of dollars and failing to provide merchants with multiple unaffiliated networks for each debit card transaction. Accordingly, the plaintiffs' motion is **GRANTED** and defendant's motion is **DENIED**.

FACTUAL BACKGROUND

Four of the six plaintiffs in this case are major trade associations in the retail industry. NACS is an international trade association comprised of more than 2,100 retail members and 1,600 supplier members in the convenience store industry, most located in the United States. Am. Compl. , 15 [Dkt. # 18]. NRF is "the world's largest retail trade association," representing department, specialty, discount, catalog, Internet, and independent stores, as well as chain restaurants, drug stores, and grocery stores in over 45 countries. *Id.* ¶ 17. FMI advocates for 1,500 food retailers and wholesalers, including large multi-store chains, regional firms, and independent supermarkets. *Id.*, ¶ 19. NRA is the "leading national association representing th[e] [restaurant and food-service] industry, and its members account for over one-third of the industry's retail locations." *Id.* ¶ 23. According to plaintiffs, these trade associations and their members accept debit card payments and therefore are directly affected by the Board's interchange fee and network non-exclusivity regulations. *Id.* ¶¶ 16, 18, 20, 23-25.

The remaining plaintiffs are individual retail operations. Miller is a convenience store and gasoline retailer that also sells heating oil, heating and air-conditioning service, and commercial and wholesale fuels in the United States. *Id.* , 21. Boscov's is an in-store and online retailer with a chain of forty full-service department stores located in five states in the mid-Atlantic region. *Id.* ¶ 22. Both accept debit cards. See *id.* ¶¶ 21-22.

The Board is a federal government agency responsible for the operation of the Federal Reserve System and promulgation of our nation's banking regulations. *Id.* ¶ 26.

I. Debit Cards and Networks

Although now ubiquitous, debit cards were first introduced as a form of payment in the United States in only the late-1960s and early-1970s. *See* Final Rule, *Debit Card and Interchange Fees and Routing*, 76 Fed. Reg. 43,394, 43,395 (July 20, 2011) (codified at 12 C.F.R. §§ 235.1-235.10) ("Final Rule"). Unlike other payment options, debit cards allow consumers to pay for goods and services at the point of sale using cash drawn directly from their bank accounts, and to withdraw and receive cash back as part of the transaction. *Id.* Prior to debit cards, consumers had to use paper checks or make in person withdrawals from human bank tellers in order to access their accounts. *Id.*

After decades of slow growth, the volume of debit card transactions increased rapidly in the mid-1990s, as did transactions involving other forms of electronic payment such as credit cards. *Id.* at 43,395 & n.5. This upsurge in debit card usage continued into the 2000s, reaching approximately 37.9 billion transactions in 2009. *Id.* at 43,395. By 2011, debit cards were "used in 35 percent of noncash payment transactions, and have eclipsed checks as the most frequently used noncash payment method." *Id.*

Most debit card transactions involve four parties, in addition to the network that processes the transaction. *Id.* at 43,395 & n.l4. These parties are: (1) the cardholder (or consumer), who provides the debit card as a method of payment to a merchant; (2) the issuer (or issuing bank), which holds the consumer's account and issues the debit card to the consumer; (3) the merchant, who accepts the consumer's debit card as a method of payment; and (4) the acquirer (or acquiring bank), which receives the debit card transaction information from the merchant and facilitates the authorization, clearance, and settlement of the transaction on behalf of the merchant. *Id.* at 43,395-96. The network provides the software and infrastructure needed to route debit transactions; it transmits consumer account information and electronic authorization requests from the acquirer to the issuer; and it returns a message to the acquirer either authorizing or declining the transaction. *See* 15 U.S.C. § 1693o-2(c)(11) (defining "payment card network"); 76 Fed. Reg. at 43,396. In addition, "[b]ased on all clearing messages received in one day, the network calculates and communicates to each issuer and acquirer its net debit . . . position for settlement." 76 Fed. Reg. at 43,396.

There are two types of debit card transactions-PIN (or "personal identification number") and signature-each of which requires its own infrastructure. In a PIN transaction, the consumer enters a number to authorize the transaction, and the data is carried in a single message over a system evolved from automated teller machine ("ATM") networks. *Id.* at 43,395. In a signature transaction, the consumer authenticates the transaction by signing something (like a receipt), and the data is routed over a dual message system utilizing credit card networks. *Id.*[1] "Increasingly, however, cardholders authorize 'signature' debit transactions without a signature and, sometimes, may authorize a 'PIN' debit transaction without a PIN." 76 Fed. Reg. at 43,395 & n.10.

The vast majority of debit cards (excluding prepaid cards) support authentication by both PIN and signature, but which one is used in a given transaction depends in large part on the nature of the transaction and the merchant's acceptance

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[1] *See also* Steven C. Salop et al., *Economic Analysis of Debit Card Regulation Under Section* 920 ¶ 20 (Oct. 27, 2010) [Dkt. #33] (Joint Appendix 0332-0460) ("Salop").

policy. *Id.* at 43,395. For instance, hotel stays and car rentals are not easily processed on PIN-based systems because the transaction amount is unknown at the time of authorization. *Id.* Internet, telephone, and mail-based merchants also generally do not accept PIN transactions. *Id.* Of the eight million merchants in the United States that accept debit cards, the Board estimates that only one-quarter have the ability to accept PIN transactions. *Id.*

II. Debit Card Fees

There are several fees associated with debit card transactions. The largest is the interchange fee, which is set by the network and paid by the acquirer to the issuer to compensate the latter for its role in the transaction. *Id.* at 43,396; *see also* § 1693o-2(c)(8) (defining "interchange transaction fee"). The network also charges acquirers and issuers a switch fee to cover its own transaction-processing costs. 76 Fed. Reg. at 43,396; *see also* § 1693o-2(c)(l0) (defining "network fee"). Once these fees are assessed, the acquirer credits the merchant's account for the value of its transactions, less a "merchant discount," which includes the interchange fee, network switch fees charged to the acquirer, other acquirer costs, and a markup. 76 Fed. Reg. at 43,396.

When PIN debit cards were first introduced, most regional networks set their interchange rates at "par," offering no cost subsidization to either merchants or issuers.[2] Some networks, however,

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[2] Stephen Craig Mott, *Industry Facts Concerning Debit Card Regulation Under Section 920 ¶ 7* (Oct. 27, 2010) [Dkt.
(Continued . . .)

implemented "reverse" interchange fees, which issuers paid to acquirers to offset the cost to merchants of installing terminals and other infrastructure needed to accept PIN at the point of sale. 76 Fed. Reg. at 43,396; Salop, *supra* note 1, ¶ 21; Mott, *supra* note 2, ¶ 7. Because this model eliminated the costs associated with paper checks and human bank tellers, issuers could provide debit services at a profit, even without collecting interchange fees.[3] Furthermore, issuers touted the convenience of PIN-debit to their customers, and customers in tum maintained higher account balances, which issuers could loan out at a profit. Mott, *supra* note 2, ¶ 3.

As debit cards became more popular, interchange fee rates and the direction in which the fees flowed began to shift. *See* 76 Fed. Reg. at 43,396. By the early-2000s, acquirers were paying issuers ever-increasing interchange fees for PIN transactions. *See id.* Interchange fees for signature transactions, meanwhile, were modeled on credit card fees and were even higher than for PIN. *Id.*; Salop, *supra* note 1, ¶ 23.

#33] (Joint Appendix 0292-0331) ("Mott"); Salop, *supra* note 1, ¶ 21.

[3] Merchants Payments Coalition ("MPC"), *Comments in Response to Notice of Proposed Rulemaking on Debit Card Interchange Fees and Routing* at 1 (Feb. 22, 2011) [Dkt. #33] (Joint Appendix 0149-0238) ("MPC Comments"); Salop, *supra* note 1, ¶ 21.

In recent years, interchange fees have climbed sharply with PIN outpacing signature debit fees. From 1998 to 2006, merchants faced a 234 percent increase in interchange fees for PIN transactions, Mott, *supra* note 2, ¶ 24, and by 2009, interchange fee revenue for debit cards totaled $16.2 billion, 76 Fed. Reg. at 43,396. For most retailers, debit card fees represent the single largest operating expense behind payroll.[4]

Because debit card transaction fees, including interchange fees, are set by the relevant network and paid by the acquirer (on behalf of merchants) to the issuer, perhaps the best way to understand why such fees have skyrocketed over the past two decades is to recognize the market dynamics among the networks, issuers, and merchants. Although there are many debit card networks in the United States, networks under Visa's and MasterCard's ownership account for roughly 83 percent of all debit transactions and nearly 100 percent of signature transactions.[5] Visa also owns Interlink, the largest PIN network.[6] Due

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[4] NACS, *Comments in Response to Notice of Proposed Rulemaking on Debit Card Interchange Fees and Routing* at 1 (Feb. 22, 2011) [Dkt. #33] (Joint Appendix 0239-0248) ("NACS Comments").

[5] Salop, *supra* note 1, ¶ 26; Senator Richard J. Durbin, *Comments in Response to Notice of Proposed Rulemaking on Debit Card Interchange Fees and Routing* at 1 (Feb. 22, 2011) [Dkt. #33] (Joint Appendix 0125-0140) ("Durbin Comments").

[6] Salop, *supra* note 1, ¶ 26. Today, there are approximately 15 PIN debit networks, the largest of which are Interlink (owned by Visa), Star (owned by First Data Corp.),

(Continued . . .)

to their hefty market share, Visa and MasterCard exercise considerable market power over merchants with respect to debit card acceptance. *See* Salop, *supra* note 1, ¶ 35. Hundreds of millions of consumers use cards that operate on Visa's and MasterCard's debit networks. *Id.* ¶ 36. Merchants know that if they do not accept those cards and networks, they risk losing sales, and "losing the sale would be costlier to the merchant than accepting debit and paying the high interchange fee." *Id.*

At the same time, Visa, MasterCard, and other debit networks vie for issuers to issue cards that run on their respective networks. *Id.* ¶¶ 33, 43. They can entice issuers by emphasizing their relative market power and ability to set interchange and other fees. *Id.; see also* 76 Fed. Reg. at 43,396. Networks thus have an incentive to continuously raise merchants' interchange fees-which, again, flow from merchants to issuers-as a way to attract issuers to the network.[7]

PULSE (owned by Discover), and NYCE (owned by FIS). *Id.* ¶ 22.

[7] Salop, *supra* note 1, ¶¶ 34, 44; *see also id.* ¶ 49 ("When debit networks raise their interchange fee, they gain issuance and cardholders, but they do not lose merchant acceptance."); Durbin Comments, *supra* note 5, at 5 ("[C]ompetition between networks does not lead to downward pressure on interchange rates because networks compete to attract issuers and do so by raising interchange fees."); MPC Comments, *supra* note 3, at 1 ("As banks became accustomed to receiving high interchange rates ... which bore no relationship to costs ... a dynamic of merchants being forced to pay ever-increasing interchange rates to underwrite network competition for issuers became the norm for the industry.").

Visa, for instance, more than tripled the Interlink interchange fee since the early-1990s, forcing small competitor PIN networks to increase their fees as well. Mott, *supra* note 2, ¶¶ 23-24; Salop, *supra note* 1, ¶¶ 40, 46. Within each network, issuers all receive the same interchange fee, regardless of their efficiency in processing transactions or their efforts to prevent fraud. *See* Durbin Comments, *supra* note 5, at 5, 9.

In addition, Visa's and MasterCard's "Honor All Cards" rules force merchants that accept their networks' ubiquitous credit cards also to accept their signature debit cards with their corresponding high signature transactions fees.[8] As a practical matter, then, merchants cannot put downward pressure on interchange fees by rejecting network affiliated debit cards. Durbin Comments, *supra* note 5, at 2, 5. And issuers have implemented reward programs, special promotions, and penalty fees to encourage debit (especially signature-debit) usage. Mott, *supra* note 2, ¶¶ 16-18; Salop, *supra* note 1, ¶ 47. Merchants have responded by raising the price of goods and services to offset the fees. *See* Durbin Comments, *supra* note 5, at 5, 9; NRF Comments, *supra* note 8, at 5.

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[8] Mott, *supra* note 2, ¶ 13; MPC Comments, *supra* note 3, at 1; NRF, *Comments in Response to Notice of Proposed Rulemaking on Debit Card Interchange Fees and Routing* at 4 (Feb. 22, 2011) [Dkt. #33] (Joint Appendix 0249-0256) ("NRF Comments").

The major card networks, not surprisingly, have also increased their own network fees, facilitated in part by exclusivity deals between the leading networks and debit issuers. Mott, *supra* note 2, ¶¶ 26-27; Salop, *supra* note 1, ¶¶ 30-31. Although there has been some network competition for PIN transactions, Visa and MasterCard have longstanding operating rules that disallow any other network from handling signature transactions on their cards. 76 Fed. Reg. at 43,396; Mott, *supra* note 2, ¶¶ 26-27; Salop, *supra* note 1, ¶¶ 30-31. Within the PIN market, too, Visa has agreements with particular issuers that create exclusivity via "volume commitments that are pegged to incentives such as reduced fees" or require that Interlink be their sole PIN debit network. Salop, *supra* note 1, ¶ 30. Thus, the dominant networks have been able to raise their network fees on merchants without concern for lost transaction volume because merchants have no other alternatives for routing transactions. *Id.* ¶ 31. According to information collected by the Board, total network fees exceeded $4.1 billion in 2009, with networks charging issuers and acquirers more than $2.3 billion and $1.8 billion, respectively. 76 Fed. Reg. at 43,397.

III. The Durbin Amendment

On July 21, 2010, Congress passed legislation to address the rise of debit card fees. Coined the "Durbin Amendment" after its sponsor, Illinois Senator Richard J. Durbin, the legislation seeks to implement Section 920 of the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693o-2, as enacted by Section 1075 of the Dodd-Frank Wall

Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376, 2068-2074 (2010). The Durbin Amendment imposes various standards and rules governing debit fees and transactions. *See id.*; 76 Fed. Reg. at 43,394. The regulations apply only to issuers with assets exceeding $10 billion. § 1693o-2(a)(6)(A).

A. Interchange Fees

The Durbin Amendment first addresses interchange transaction fees, which are defined as "any fee established, charged or received by a payment card network for the purpose of compensating an issuer for its involvement in an electronic debit transaction." § 1693o-2(c)(8). It provides that the fee charged by the issuer "with respect to an electronic debit transaction shall be reasonable and proportional to the cost incurred by the issuer with respect to the transaction." *Id.* § 1693o-2(a)(2) (emphasis added). It then directs the Board to establish standards to determine whether the amount of a debit card interchange fee is "reasonable and proportional to the cost incurred by the issuer" with respect to the transaction. *Id.* § 1693o-2(a)(3)(A). To promulgate these standards, Congress instructs the Board that it:

> Shall–
>
> (A) consider the functional similarity between–
>
> > (i) electronic debit transactions; and

(ii) checking transactions that are required within the Federal Reserve bank system to clear at par; [and]

(B) distinguish between–

(i) the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction, which cost shall be considered under[§ 1693o-2(a)(2)]; and

(ii) other costs incurred by an issuer which are not specific to a particular electronic debit transaction, which costs shall not be considered under[§ 1693o-2(a)(2)]

Id. § 1693o-2(a)(4)(A)–(B).

Once the Board establishes this interchange transaction fee standard, Congress authorizes the Board to adjust the fee to allow for fraud-prevention costs, provided the issuer complies with standards established by the Board relating to fraud prevention:

(5) Adjustment to interchange transaction fees for fraud prevention costs

(A) Adjustments. The Board may allow for an adjustment to the fee amount received or charged by an issuer under[§ 1693o-2(a)(2)], if–

(i) such adjustment is reasonably necessary to make allowance for costs incurred by the issuer in preventing fraud in relation to electronic debit transactions involving that issuer; and

(ii) the issuer complies with the fraud-related standards established by the Board under[§ 1693o-2(a)(5)(B)], which standards shall–

(I) be designed to ensure that any fraud-related adjustment of the issuer is limited to the amount described in clause (i) and takes into account any fraud-related reimbursements (including amounts from charge-backs) received from consumers, merchants, or payment card networks in relation to electronic debit transactions involving the issuer; and

(II) require issuers to take effective steps to reduce the occurrence of, and costs from, fraud in relation to electronic debit transactions, including

> through the development and implementation of cost-effective fraud prevention technology.

Id. § 1693o-2(a)(5)(A).[9]

B. Network Regulation

The Durbin Amendment also instructs the Board to regulate network fees by prescribing rules related to network non-exclusivity for routing debit transactions. 76 Fed. Reg. at 43,394. Preferring a market-oriented approach to network fees,[10] the Durbin Amendment provides that the Board may regulate such fees only as necessary to ensure that they are not used to "directly or indirectly compensate an issuer with respect to an electronic debit transaction" or "circumvent or evade the restrictions . . . and regulations" prescribed by the Board under this subsection. § 1693o-2(a)(8)(B)(i)-(ii). At the same time, the Amendment requires the Board to adopt rules that prohibit issuers and networks from entering into exclusivity arrangements or imposing restrictions on the

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[9] This fraud-prevention cost adjustment was the subject of a separate rulemaking by the Board. *See* Final Rule, *Debit Card and Interchange Fees and Routing*, 77 Fed. Reg. 46,258 (adopted Aug. 3, 2012) (codified at 12 C.F.R. § 235.4).

[10] "The term 'network fee' means any fee charged and received by a payment card network with respect to an electronic debit transaction, other than an interchange transaction fee." § 1693o-2(c)(l0).

networks through which merchants may route a transaction. Specifically, Congress directs the Board to promulgate regulations providing that issuers and networks "shall not directly or through any agent ... restrict the number of payment card networks[11] on which an electronic debit transaction may be processed" to one such network or two or more affiliated networks or "inhibit the ability of any person who accepts debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions." § 1693o-2(b)(l)(A)–(B).

IV. The Board's Rule

After the enactment of the Dodd-Frank Act, the Board sought information from various industry participants to assist the agency in its initial rulemaking. The Board met with debit card issuers, payment card networks, merchant acquirers, consumer groups, and industry trade associations on a number of occasions to discuss a host of issues including debit transaction processing flows, transaction fee structures and levels, fraud prevention activities, fraud losses, routing restrictions, card-issuing arrangements, and

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[11] "Payment card network" is defined as "an entity that directly, or through licensed members, processors, or agents, provides the proprietary services, infrastructure, and software that route information and data to conduct debit card or credit card transaction authorization, clearance, and settlement, and that a person uses in order to accept as a form of payment a brand of debit card." § 1693o-2(c)(11).

incentive programs.[12] In September 2010, the Board circulated surveys to financial organizations with assets totaling $10 billion or more, networks that process debit card transactions, and the largest nine merchant acquirers in order to collect data on PIN, signature, and prepaid debit card operations and, for each card type, the costs associated with interchange and other network fees, fraud losses, fraud-prevention and data-security activities, network exclusivity arrangements, and debit-card routing restrictions. 75 Fed. Reg. at 81,724-25. In both the proposed and final rulemaking, the Board provided a detailed summary of the survey responses, *see id.* at 81,724-26; 76 Fed. Reg. at 43,397-98, and upon issuing the Final Rule, it released a full report including survey statistics.[13]

A. Proposed Rule

On December 28, 2010, the Board issued a NPRM implementing the Durbin Amendment and requesting public comments. 75 Fed. Reg. at 81,722.

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[12] Notice of Proposed Rulemaking, *Debit Card Interchange Fees and Routing*, 75 Fed. Reg. 81,722, 81,724 (proposed Dec. 28, 2010) (to be codified at 12 C.P.R.§§ 235.1-235.10) ("NPRM"); *see also* Durbin Comments, *supra* note 5, at 2 (describing Board's "information-gathering process" as "notable for its transparency and thoroughness").

[13] *See generally* Bd. of Governors of the Federal Reserve Sys., *2009 Interchange Revenue, Covered Issuer Cost, and Covered Issuer and Merchant Fraud Loss Related to Debit Card Transactions* [Dkt. #33] (Joint Appendix 0261-0291), *available at* http://www.federalreserve.gov/paymentsystems/files/debit fees_costs.pdf.

Stemming from its determination to include "only those costs that are specifically mentioned for consideration in the statute," the Board proposed that the interchange transaction fee standard be limited to the costs associated with the authorization, clearing, and settlement ("ACS") of an electronic debit transaction that vary with the number of transactions sent to the issuer within the reporting period. *Id.* at 81,734-35, 81,739. The Board noted that, by focusing on the issuer's variable, per-transaction ACS costs, it was carrying out Congress's mandate to establish standards to assess whether an interchange fee is reasonable and proportional to the cost incurred by the issuer with respect to the transaction. *Id.* Consequently, in the NPRM, the Board suggested that network processing fees,[14] as well as fixed[15] and overhead[16] costs common to all

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[14] 75 Fed. Reg. at 81,735-36, 81,739; 76 Fed. Reg. at 43,424. The Board proposed in the NPRM that network fees be excluded from the interchange fee standard. 75 Fed. Reg. at 81,735. Including them in allowable costs would risk putting merchants "in the position of effectively paying all network fees associated with debit card transactions" because "an acquirer would pay its own network processing fees directly to the network and would indirectly pay the issuer's network processing fees through the allowable costs included in the interchange fee standard." *Id.*

[15] The Board proposed that fixed costs–even if incurred for activities related to the ACS of debit card transactions–*not* be factored into allowable costs within the interchange fee calculus. 75 Fed. Reg. at 81,736 ("This [proposed] measure would not consider costs that are common to all debit card transactions and could never be attributed to any particular transaction [*i.e.*, fixed costs], even if those costs are specific to debit transactions as a whole."). Indeed, the Board specifically

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debit transactions and not attributable to the ACS of any one transaction, be excluded from recovery under the interchange transaction fee standard. Fraud losses and the costs of fraud-prevention and reward programs were also deemed unallowable because they are not attributable to the variable ACS costs incurred by an issuer. 75 Fed. Reg. at 81,755, 81,760.

While merchants overwhelmingly supported the Board's plan to limit allowable costs within the interchange transaction fee standard to only incremental ACS costs, networks and issuers advocated expanding the proposed set of allowable costs. 76 Fed. Reg. at 43,424-25. Indicating that its proposal was still subject to change, the Board "request[ed] comment on whether it should allow recovery through interchange fees of the other costs of a particular transaction beyond authorization, clearing, and settlement" and, if so, "on what other

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contemplated that costs that do not vary with the number of transactions sent to the issuer over the calendar year, such as network connectivity fees and fixed costs of production, would be excluded as "unallowable, fixed costs," or "those costs that do not vary, up to existing capacity limits, with the number of transactions sent to the issuer over the calendar year," under the interchange transaction fee standard. *Id.* at 81,736, 81,739, 81,760.

[16] In the NPRM, the Board recommended that the cost of an issuer's facilities, human resources, and legal staff, as well as its costs in operating a branch office, be categorized as common overhead costs that cannot be allocated for the purpose of calculating its permissible interchange transaction fee. 75 Fed. Reg. at 81,735, 81,760.

costs of a particular transaction, including network fees paid by issuers for the processing of transactions, should be considered allowable costs." 75 Fed. Reg. at 81,735.

Drawing on its comprehensive survey data relating to debit transaction fees, the Board proposed two alternative standards to govern interchange fees. The first, which the Board called "Alternative 1," allowed each issuer to recover its actual incremental ACS costs up to a safe harbor of seven cents ($.07) per transaction if the issuer chose not to determine its individual allowable costs, and up to a cap of twelve cents ($.12) if it did. 75 Fed. Reg. at 81,736-38. The second, "Alternative 2," set a cap at a flat twelve cents ($.12) per transaction. *Id.* at 81,738.

With respect to network non-exclusivity for routing debit transactions, the Board requested comment on two alternative methods for implementation. The first, called "Alternative A," required at least two unaffiliated payment card networks active on each debit card, even if one network processed only signature transactions and one handled only PIN transactions. *See* 75 Fed. Reg. at 81,749. The second, "Alternative B" required at least two active unaffiliated payment card networks for each type of authorization method–*i.e.*, at least two to process PIN transactions and two to process signature. 75 Fed. Reg. at 81,749. In either case, issuers and networks could not inhibit a merchant's ability to direct the routing of an electronic debit transaction over any available network. *Id.* at 81,751.

More than 11,500 commenters–including several of the named plaintiffs, as well as various issuers, payment card networks, consumers, consumer advocates, trade associations and members of Congress–replied to the Board's request for comment. 76 Fed. Reg. at 43,394.[17] In drafting the Final Rule, the Board relied on the voluminous comments, the statutory provisions, the available cost data, its understanding of the debit payment system, and other relevant information. 76 Fed. Reg. at 43,394.

B. Final Rule

The Board's Final Rule was published on July 20, 2011 and became effective on October 1, 2011. *See id.* As its standard for assessing whether the interchange fee for a debit transaction is reasonable and proportional to the issuer's costs, the Board adopted "a modified version of proposed Alternative 2." *Id.* at 43,404. It permits each issuer to receive a fee as high as twenty-one cents ($.21) per transaction plus an *ad valorem* amount of five basis points of the transaction's value (0.05%). 12 C.P.R. § 235.3(b).

The Board increased the allowable interchange fee (from twelve cents in Alternative 2 to twenty-one cents in the Final Rule) after concluding that the

[17] 76 Fed. Reg. at 43,394; *see generally* Durbin Comments, *supra note* 5; FMI, *Comments in Response to Notice of Proposed Rulemaking on Debit Card Interchange Fees and Routing* (Feb. 22, 2011) [Dkt. #33] (Joint Appendix 0141-0148); NACS Comments, *supra* note 4; NRF Comments, *supra* note 8.

language and purpose of the Durbin Amendment allow the Board to consider additional costs not explicitly excluded from consideration by the statute. *Id.* at 43,426-27. According to the Board,§ 1693o-2(a)(4)(B) on the one hand *requires* the Board to consider incremental ACS costs incurred by issuers, and on the other hand *prohibits* consideration of any issuer costs that are not specific to a particular transaction; but it is *silent* with respect to costs that fall into neither category (*e.g.*, costs specific to a particular transaction but are not incremental ACS costs). *Id.* at 43,426. The Board concluded that it had discretion to consider costs on which the statute is silent. *Id.*

In setting the final interchange transaction fee standard, the Board considered all costs for which it had data, other than those prohibited under subsection (a)(4)(B). *Id.* Based on survey data and public comments, the Board found that issuers incur transaction costs other than the variable ACS costs that the Board originally proposed as the only allowable costs in the interchange fee, and that "no electronic debit transaction can occur without incurring these [non-variable ACS] costs, making them . . . specific to each and every electronic debit transaction" under the statute. *Id.* at 43,427; *see also id.* at 43,404. Consequently, the Board amended its final interchange transaction fee standard to include, in addition to variable ACS costs: (1) fixed costs related to processing a particular transaction, such as network connectivity and software, hardware, equipment, and labor; (2) transaction monitoring costs; (3) an allowance for fraud losses (the *ad* *valorem* component); and (4) network processing fees. *Id.* at 43,404, 43,429-31.[18]

As to the network non-exclusivity rule, the Board concluded that "[t]he plain language of the statute does not require that there be two unaffiliated payment card networks available to the merchant for each method of authentication." *Id.* at 43,44 7; *see also id.* ("(T]he statute does not expressly require issuers to offer multiple unaffiliated signature *and* multiple unaffiliated PIN debit card network choices on each card." (emphasis added)). Hence, the Board adopted Alternative A, which requires only that two unaffiliated networks be available for each debit card, not for each authorization method. 12 C.F.R. § 235.7(a)(2) & Official Cmt. 1; 76 Fed. Reg. at 43,404.

On the same day that the Board adopted its Final Rule on debit card interchange fees and network non-exclusivity, it also published a separate Interim Final Rule on a proposed adjustment to the interchange fee for fraud-prevention costs under 15 U.S.C. § 1693o-2(a)(5). *See* 76 Fed. Reg. at 43,478. The Board has since finished that rulemaking, and on August 2, 2012 it adopted a final rule governing

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[18] The Board still excluded from the final interchange transaction fee standard other costs not incurred as a consequence of effecting a transaction, including costs related to customer inquiries, reward programs, corporate overhead (*e.g.*, executive compensation), establishing the account relationship, card production and delivery, marketing, research and development, and network membership fees. *Id.* at 43,404, 43,427-29.

the fraud-prevention cost adjustment. *See* 77 Fed. Reg. 46,258; 12 C.F.R. § 235.4.[19]

V. This Litigation

On November 22, 2011, plaintiffs sued the Board, seeking a declaratory judgment that the Final Rule's interchange fee and network non-exclusivity provisions (12 C.F.R. §§ 253.3(b) and 235.7(a)(2)) are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. *See generally* Compl. [Dkt. #1]. Moreover, plaintiffs seek costs and reasonable attorneys' fees pursuant to 28 U.S.C. § 2412, and such other relief as the Court deems reasonable and proper. *See generally* Am. Compl. Plaintiffs amended their complaint on March 2, 2012. *Id.*

As individual retailers that accept debit cards and trade associations comprised of merchants, *see supra* p. 2, plaintiffs contend that the Final Rule is an unreasonable interpretation of the Durbin Amendment because it ignores Congress's directives regarding interchange fees and network exclusivity. *See* Am. Compl. ¶¶ 5, 11. As to the former, plaintiffs

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[19] The Board allows issuers to "receive or charge an amount of no more than 1 cent per transaction in addition to any interchange transaction fee it receives or charges" if the issuer "develop[s] and implement[s] policies and procedures reasonably designed to take effective steps to reduce the occurrence of, and costs to all parties from, fraudulent electronic debit transactions, including through the development and implementation of cost-effective fraud-prevention technology." 12 C.F.R. § 235.4(a), (b)(l).

assert that the Durbin Amendment limits the Board's consideration of allowable costs to the "incremental cost" of "authorization, clearance and settlement of a particular electronic debit transaction," and that, by including other costs in the fee standard, the Board "acted unreasonably and in excess of its statutory authority." *Id.* ¶¶ 6, 70-73, 82-83. Regarding the latter, plaintiffs argue that the Board disregarded the plain meaning of the Durbin Amendment and misconstrued the statute by adopting a network non-exclusivity rule requiring all debit *cards* be interoperable with at least two unaffiliated payment networks, rather than requiring that all debit *transactions* be able to run over at least two unaffiliated networks. *Id.* ¶¶ 9-10, 91-93.

Plaintiffs moved for summary judgment on March 2, 2012, arguing that the Final Rule's interchange transaction fee and network non-exclusivity regulations should be declared invalid under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), because the Board impermissibly implemented the Durbin Amendment's statutory command and thus exceeded its authority. Pls.' Mot. for Summ. J. ("Pls.'s Mot.") at 1 [Dkt. #20]; Pls.' Mem. in Supp. of Pls.' Mot. for Summ. J. ("Pls.' Mem.") at 2 [Dkt. #20]. The Court permitted amicus curiae briefs to be filed by three different parties: (1) a consortium of major nationwide bank and credit union trade associations in the United States;[20]

[20] *See generally* Amici Curiae Brief of The Clearing House Ass'n L.L.C. et al. ("Clearing House Amicus Br.") [Dkt.

(Continued . . .)

(2) Senator Richard J. Durbin, a member of Congress and the primary author of the Durbin Amendment;[21] and (3) a group of convenience stores, quick-service restaurants and specialty coffee shops that operate small business franchises and licensed stores.[22] The latter two groups of amici filed briefs in support of plaintiffs' motion for summary judgment; the bank and credit union amici supported neither party.

On April 13, 2012, the Board filed a cross-motion for summary judgment. contending that plaintiffs' claims lack merit and that the Board is entitled to judgment as a matter of law. Def.'s Cross-Mot. for Summ. J. ("Def.'s Cross-Mot.") at 1 [Dkt. #23]; Def.'s Mem. in Supp. of Def.'s Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. ("Def.'s Mem.") at 1-2 [Dkt. #23]. On October 2, 2012, I heard oral argument from the parties as well as the bank and credit union amici. *See* Civ. Case No. 11-2075,

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#22]. Amici are The Clearing House Association L.L.C., American Bankers Association, Consumer Bankers Association, Credit Union National Association, The Financial Services Roundtable, Independent Community Bankers of America, Mid-Size Bank Coalition of America, National Association of Federal Credit Unions, and National Bankers Association. *Id.*

[21] *See generally* Amicus Curiae Brief of Senator Richard J. Durbin ("Durbin Amicus Br.") [Dkt. #27].

[22] *See generally* Amici Curiae Brief of 7-Eleven, Inc. et al. ("7-Eleven Amicus Br. ") [Dkt. #30]. Amici are 7-Eleven, Inc., Auntie Anne's, Inc., Burger King Corporation, CKE Restaurants, Inc., International Dairy Queen, Inc., Jack in the Box Inc., Starbucks Corporation, and The Wendy's Company. *Id.*

Minute Entry, Oct. 2, 2012. For the reasons set forth below, I agree with the plaintiffs and GRANT summary judgment in their favor.

STANDARD OF REVIEW

I. Summary Judgment

Summary judgment is appropriate when the record evidence demonstrates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden is on the moving party to demonstrate an "absence of a genuine issue of material fact" in dispute. *Celotex*, 477 U.S. at 323. In a case involving judicial review of final agency action under the APA, however, "the Court's role is limited to reviewing the administrative record." *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 32 (D.D.C. 2010) (citations omitted). "[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to made the decision it d*id*." *Select Specialty Hosp.–Bloomington, Inc. v. Sebelius*, No. 09-2362, 2012 WL 4165570, at *2 (D.D.C. Sept. 19, 2012) (citations and internal quotation marks omitted).

II. Administrative Procedure Act

Under the APA, the Court must set aside agency action that exceeds the agency's "statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C). To determine whether an agency has acted outside its authority, I must apply the two-step framework under *Chevron, USA., Inc. v. Natural Res. Def Council, Inc.*, 467 U.S. 837 (1984). *See Ass'n of Private Sector Colts. & Univs. v. Duncan*, 681 F.3d 427,441 (D.C. Cir. 2012).

A *Chevron* analysis first requires the reviewing court to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. To resolve whether "the intent of Congress is clear" under this first step, *id.*, the court must exhaust the "traditional tools of statutory construction," including textual analysis, structural analysis, and (when appropriate) legislative history, *id.* at 843 n.9; *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

If after employing these tools, however, the Court concludes that the statute is silent or ambiguous on the specific issue, the Court moves on to step two and defers to any agency interpretation that is based on a permissible construction of the statute. *Id.* at 843. An agency's construction is permissible "unless it is arbitrary or capricious in substance, or manifestly contrary to the statute." *Mayo Found. For Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011) (citations and internal quotation marks omitted). "[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Ass'n of*

Private Sector Colls., 681 F .3d at 441 (citations and internal quotation marks omitted).

ANALYSIS

I. Plaintiffs Have Met Their Burden of Production for Article III Standing.

Curiously, the Board contends in a footnote that plaintiffs have failed to establish Article III standing because they failed in their opening brief to provide affidavits or other evidence that set forth specific facts demonstrating standing. *See* Def.'s Mem. at 13 n.7 (citing *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002)). But reading on, the *Sierra Club* court explicitly recognized that:

> In many if not most cases the petitioner's standing to seek review of administrative action is self-evident; no evidence outside the administrative record is necessary for the court to be sure of it. In particular, if the complainant is an object of the action (or forgone action) at issue-as is the case usually in review of a rulemaking . . . — there should be little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

292 F .3d at 899–900 (citation and internal quotation marks omitted).

Indeed, our Court of Appeals has expressly rejected the use of the *Sierra Club* rule as a procedural "gotcha" in cases where standing was reasonably thought to be self-evident. *See Am. Library Ass'n v. FCC*, 401 F.3d 489, 493-95 (D.C. Cir. 2005); *see also Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) ("*Sierra Club*, however, does not require parties to file evidentiary submissions in support of standing in every case. To the contrary, our decision made clear that '[i]n many if not most cases the petitioner's standing to seek review of administrative action is self-evident.'"). For instance, in *American Library Association*, our Circuit Court explained that interpreting *Sierra Club* as requiring long jurisdictional statements in opening briefs was inconsistent with precedent, a waste of judicial resources, and an unnecessary burden on litigants. 401 F.3d at 494. Indeed, the court went on to clarify that *Sierra Club* need only "remind[] petitioners challenging administrative actions that, *when they have good reason to know that their standing is not self-evident*, they should explain the basis for their standing at the earliest appropriate stage in the litigation." *Id.* at 493.

Here, plaintiffs had every reason to believe that their standing was self-evident and no cause to suspect that standing would be challenged in this court at all, much less in a footnote on summary judgment![23] Moreover, the administrative record

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[23] The Board chose not to file a motion to dismiss for lack of standing and gave plaintiffs no indication that it would challenge their claims on justiciability grounds. *See* Pls.' Reply Mem. in Supp. of Pls.' Mot. for Summ. J. and in Opp'n to Def.'s Mot. for Summ. J. ("Pls.' Reply") [Dkt. #26] at 7 n.3.

contains countless examples of how plaintiffs are injured by the Board's interchange transaction fee and network non-exclusivity regulations.[24] *Cf. Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 822, 824 (D.C. Cir. 2006) (standing can be "self-evident" from the administrative record). The Board's own rulemaking recognizes that it is merchants that pay interchange and network fees and are thus directly affected by the Board's Final Rule regulating both.[25] *See Fund for Animals*, 322 F.3d at 734 ("[F]or the purpose of determining whether standing is self-evident, we see no meaningful distinction between a regulation that directly regulates a party and one that directly regulates the disposition of a party's property."). Accordingly, it was reasonable for each plaintiff to assume that it (or in the case of the trade associations, one of its members) would suffer an Article III injury when the Board's Final Rule was

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[24] *See*, *e.g.*, 76 Fed. Reg. at 43,462 ("[I]it is possible that merchants with a large proportion of small-ticket transactions may experience an increase in total interchange fees . . . ."); *id.* at 43,448 ("Alternative A provides merchants fewer routing options with respect to certain electronic debit transaction compared to Alternative B.").

[25] *See, e.g.*, 76 Fed. Reg. at 43,396 ("The interchange fee is set by the relevant network and paid by the [merchant] acquirer to the issuer . . . . [T]he [merchant] acquirer charges the merchant a merchant discount . . . that includes the interchange fee"); 75 Fed. Reg. at 81,727 ("[I]n point-of-sale transactions, these [network-exclusivity prohibition and routing] provisions improve the ability of a merchant to select the network that *minimizes* its cost . . . and otherwise provides the most advantageous terms.").

implemented. And in their reply brief, plaintiffs submitted declarations demonstrating what was already self-evident: that they will suffer cognizable harms as a result of the Board's regulations. *See* Pls.' Reply at 7-9; *cf. Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 684-85 (D.C. Cir. 2004) (affidavits submitted with reply brief are sufficient under *Sierra Club* because they made associational standing "patently obvious" and respondent was not prejudiced). In short, plaintiffs have easily met their burden of production with regard to Article III standing here, and this Court will thus proceed to the merits.

II. The Interchange Transaction Fee Regulation Is Invalid Under the APA.

Plaintiffs contend that the Final Rule's interchange transaction fee standard, 12 C.F.R. § 235.3(b), is plainly foreclosed by the text, structure, and purpose of the Durbin Amendment and is arbitrary, capricious, and contrary to law. According to plaintiffs, the plain language and legislative history of the statute make clear which issuer costs may be included in the interchange transaction fee standard, and the Board's inclusion of other costs cannot survive scrutiny under *Chevron*'s first step. The Board, meanwhile, takes the position that the Durbin Amendment is silent, and therefore ambiguous, with respect to issuer costs not explicitly addressed in the statute. And because the final interchange fee provision is a reasonable construction of the statute, says the Board, it is entitled to Chevron deference. For the following reasons, I agree with the plaintiffs.

A. The Durbin Amendment Plainly Limits the Costs Allowable Within the Interchange Transaction Fee Standard to Those Identified in 15 U.S.C. § 1693o-2(a)(4)(B)(i).

Determining whether Congress has spoken to the precise question at issue through "the [statutory] language itself, the specific context in which that language is used, and the broader context of the statute as a whole" is, of course, this Court's first task. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Our Court of Appeals has directed this Court to use "all traditional tools of statutory interpretation, including text, structure, purpose, and legislative history, to ascertain Congress's intent at *Chevron* step one." *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009) (citation and internal quotation marks omitted). If this examination yields a clear result, "then Congress has expressed its intention as to the question, and deference is not appropriate." *Natural Res. Def Council, Inc. v. Daley*, 209 F.3d 747, 752 (D.C. Cir. 2000).

To discern the text's plain meaning, the Court is to look to "the language of the statute itself." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1680 (2012) (citation omitted). "[W]hen the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000) (citation and internal quotation marks omitted). "Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006); *see also FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011).

An analysis of the statutory text, however "does not end here, but must continue to 'the language and design of the statute as a whole.'" *Am. Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1178 (D.C. Cir. 1995) (quoting *Fort Stewart Sch. v. FLRA*, 495 U.S. 641,645 (1990)).[26] The Court must also "exhaust the traditional tools of statutory construction, including examining the statute's legislative history to shed new light on congressional intent, notwithstanding statutory language that appears superficially clear." *Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008) (citations omitted); *see also AFL-CIO v. FEC*, 333 F.3d 168, 172 (D.C. Cir. 2003) ("We consider the provisions at issue in context, using traditional tools of statutory construction and legislative history.").

i. Subsection (a)(4)(B) Bifurcates the Universe of Electronic Debit

[26] *See also* Roberts v. Sea-Land Servs., Inc., 132 S. Ct. 1350, 1357 (2012) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (citation omitted)); Bell Atl. Tel. Cos., 131 F.3d at 1047 ("The literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use.'").

Transaction Costs into the Allowable and the Impermissible.

The Durbin Amendment instructs the Board to ensure that any interchange fee charged by an issuer "is reasonable and proportional to the cost incurred by the issuer with respect to the transaction," § 1693o-2(a)(3), and in so doing it must "distinguish between" two categories of costs. *Id.* § 1693o-2(a)(4)(B)(i)–(ii). Plaintiffs contend that these categories bifurcate the entire universe of costs into two, and only two, groups: (1) costs that are "incremental" or variable, incurred by an issuer for its role in the "authorization, clearance, or settlement," and that relate to a "particular" or single electronic debit transaction, which "*shall* be considered,"§ 1693o-2(a)(4)(B)(i) (emphasis added); and (2) "*other* costs" "incurred by an issuer which are not specific to a particular electronic debit transaction," which "*shall not* be considered," § 1693o-2(a)(4)(B)(ii) (emphasis added). The Board disagrees, arguing that subsection (a)(4)(B) is silent when it comes to costs that are specific to a particular electronic debit transaction but that are not incremental ACS costs, as those costs do not fit into either subsection (a)(4)(B)(i) or (a)(4)(B)(ii). According to the Board, this creates ambiguity that the Board has the discretion to resolve. How convenient.

Starting with subsection (a)(4)(B)'s text, I have *no* difficulty concluding that the statutory language evidences an intent by Congress to bifurcate the entire universe of costs associated with interchange fees. Indeed, Congress directed the Board to "distinguish between"-or, according to its plain and ordinary meaning, "separate into different categories" or "make a distinction"[27]—between: (1) incremental ACS costs relating to a particular transaction, which "*shall* be considered" in establishing the interchange transaction fee standard, and (2) "other costs" which are not specific to a particular transaction, which the Board "*shall not*" consider. § 1693o-2(a)(4)(B)(i)-(ii) (emphases added). By using strategically placed "shall" and "shall not" terms–which plainly indicate the inclusion of the first category of costs and exclusion of the second–Congress expressed its clear intent to separate costs that must be included in the interchange transaction fee standard and "other costs" that must be excluded. *See Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.").

Furthermore, Congress used the inclusive phrase "other costs," as opposed to just "costs," to refer to those costs *not* to be considered in the interchange transaction fee standard. The plain import of Congress's word choice, according to the ordinary definition of "other" and relevant case law, is that

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[27] *Webster's New College Dictionary* 337 (3d ed. 2008) (defining "distinguish" as "to recognize as being different or distinct; separate into different categories; perceive or indicate differences; discriminate"); *Black's Law Dictionary* 542 (9th ed. 2009) (defining "distinguish" as "to make a distinction").

this second, prohibited category of "other costs" was intended to subsume *all* costs not explicitly addressed in the first, permissible category of costs. *See Merriam- Webster's Collegiate Dictionary* 878-79 (11th ed. 2009) (defining "other" as "being the one (as of two or more) remaining or not included; being the one or ones distinct from that or those first mentioned or implied").[28] In other words, the plain text makes clear that the incremental ACS cost of a particular electronic debit transaction is the *only* cost the Board was expressly authorized to consider in its interchange transaction fee standard.

The Board's counterargument-that Congress directed it not to consider "other costs incurred by an issuer *which* are not specific to a particular electronic debit transaction," § 1693o-2(a)(4)(B)(ii) (emphasis added), meaning that only costs "not specific to a particular . . . transaction" are barred from consideration–is wholly unpersuasive. *See* Def.'s Mem. at 20-21. The non-restrictive pronoun "which" is a descriptor, rather than a qualifier, and Congress has repeatedly utilized this term to further *describe* the preceding phrase–here, "other costs"-

[28] *See also Ass'n of Private Sector Colls.*, 681 F.3d at 443-44 (holding that Congress intended the phrase "other incentive payment" to broadly cover abuses not enumerated); *FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1100 (D.C. Cir. 2008) ("This interpretation, one which gives meaning to the word 'other' by reading sequentially to understand 'other' as meaning 'different from that already stated in subsections (a)-(c),' gives coherent effect to all sections .... " (quoting *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 71-72 (2d Cir. 1998))).

rather than to condition or limit it. *See United States v. Indoor Cultivation Equip. from High Tech Indoor Garden Supply*, 55 F .3d 1311, 1315 (7th Cir. 1995) (concluding that Congress's use of the pronoun "which," as in "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used to . . . facilitate [drug transactions]," did not limit the meaning of the word it amended, "conveyance," to a vehicle or vessel used or intended to be used to facilitate a drug transaction).[29] Not surprisingly, the Board fails to cite any persuasive definition or case law to the contrary, and its focus on commas is a red herring. *See, e.g., Barrett v. Van Pelt*, 268 U.S. 85, 91 (1925) ("Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning." (citation omitted)).

Finally, statements by Senator Richard J. Durbin, the Amendment's chief sponsor, confirm that Congress intended to bifurcate the universe of costs into incremental ACS costs includable in the interchange transaction fee standard and all other costs to be excluded. Specifically, in addressing the meaning of the Amendment on the floor of the

[29] *See also* William Strunk Jr. & E.B. White, *The Elements of Style* 1, 3 (2d ed. 1972) (describing an "elementary rule[ ] of usage" that a "nonrestrictive clause is one that does not serve to identify or define the antecedent noun"); *cf. In re Connors*, 497 F.3d 314, 319 (3d Cir. 2007) ("The word 'that' is a relative pronoun that restricts and, therefore, modifies, the preceding noun[.]")

Senate prior to its final passage, Senator Durbin stated:

> Paragraph (a)(4) [of the Amendment] makes clear that the cost to be considered by the Board in conducting its reasonable and proportional analysis is the incremental cost incurred by the issuer for its role in the authorization, clearance, or settlement of a particular electronic debit transaction, *as opposed to other costs incurred by an issuer which are not specific to the authorization, clearance, or settlement of a particular electronic debit transaction.*

156 Cong. Rec. S5,925 (daily ed. July 15, 2010) (emphasis added). Although the Board admits that Senator Durbin's statement appears to divide the universe of costs into two categories, it argues nonetheless that the actual language of the statute overrides any floor statement by the bill's sponsor. *See* Def.'s Mem. at 20. *Chevron*, however, contemplates that legislative history–including history that does not match the text of the statute verbatim–will be read *along with* the statute to determine Congress's intent. *See Chevron*, 467 U.S. at 851-53, 862-64; *Aid Ass'n for Lutherans v. US. Postal Serv.*, 321 F.3d 1166, 1176-78 (D.C. Cir. 2003) (using legislative history, in tandem with plain language of statute, in *Chevron* step one). In this case, Senator Durbin's statement, read in conjunction with the statute's text, confirms that Congress intended to divide all costs into two categories: those that can and those that cannot be considered in setting the interchange fee standard.

ii. Congress Intended to Exclude All Costs Other than the Incremental ACS Costs Incurred by the Issuer for a Particular Debit Transaction from the Interchange Fee Standard.

Further parsing of the statute confirms that Congress intended to narrow the scope of costs considered in the interchange transaction fee standard. Subsection (a)(4)(B)(i) directs the Board to include in the standard those ACS costs that are "*incremental* [to the] cost incurred by an issuer for the role *of the issuer* in ... a particular electronic debit transaction." § 1693o-2(a)(4)(B)(i) (emphasis added). The term "incremental" limits the includable costs to "variable, as opposed to fixed," ACS costs. *Me. Pub. Serv. Co. v. FERC*, 964 F.2d 5, 9 (D.C. Cir. 1992).[30] And the subsection includes only those costs incurred for the issuer's role in processing the transaction. § 1693o-2(a)(4)(B)(i).

In addition, subsection (a)(4)(B)(ii) instructs the Board to exclude from the standard any "other costs incurred by an issuer which are not *specific* to a *particular* . . . transaction." §1693o-2(a)(4)(B)(ii) (emphases added). Congress thus directed the Board to omit "other costs incurred by an issuer which are

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[30] *See also* 75 Fed. Reg. at 81,735 (in NPRM, proposing that "incremental cost" be defined as an average, variable and per-transaction cost that varies with the number of transactions); *Webster's New College Dictionary* 575 (3d ed. 2008) (defining "increment" as "a small positive or negative change in a variable").

not [unique] to a [distinct or individual] transaction."[31] The plain text of the Durbin Amendment thus precludes the Board from considering in the interchange fee standard any costs, other than variable ACS costs incurred by the issuer in processing each debit transaction.

The Board contends that the statute's failure to define the terms "incremental cost" or "authorization, clearance, or settlement," or to delineate which types of costs are "not specific to a particular electronic debit transaction," renders those terms ambiguous, thereby giving the Board the authority to fill those statutory gaps. *See* Def.'s Mem. at 26-27. Not quite! If I were to accept the Board's argument, then every term in the statute would have to be specifically defined or otherwise be deemed ambiguous. This result makes no sense, and more importantly, it is not the law. When a term is not defined in a statute, a court must assume that "the legislative purpose is expressed by the ordinary meaning of the words used." *AT&T*, 131 S. Ct. at 1182; *United States v. Locke*, 471 U.S. 84, 95 (1985) (distinguishing "filling a gap left by Congress' silence" from "rewriting rules that Congress has

[31] *Webster's New College Dictionary* 1085 (3d ed. 2008) (defining "specific" as "distinctive or unique; intended for, applying to, or acting on a given thing; definite"); *Merriam-Webster's Collegiate Dictionary* 903 (11th ed. 2009) (defining "particular" as "a separate part of a whole; an individual fact, point, circumstance or detail; an individual or a specific subclass ... falling under some general concept or term.").

affirmatively and specifically enacted") (citation omitted).

"[T]he meaning of statutory language, plain or not, depends on context," *King v. St. Vincent's Hosp.*, 502 U.S. 215,221 (1991), and the relevant provisions, statutory design, and legislative history here clearly support my reading of the statute. First, the statute's information collection provision explicitly requires public disclosure only of information "concerning the costs incurred, and interchange transaction fees charged or received . . . *in connection with the authorization, clearance or settlement of electronic debit transactions*." § 1693o-2(a)(3)(B) (emphasis added). That disclosure is limited to the same costs specified in subsection (a)(4)(B)(i) reinforces that those ACS costs are the only ones Congress intended to include in the interchange transaction fee standard.[32]

Subsection (a)(4)(A) of the statute also directs the Board to consider the "functional similarity" between "electronic debit transactions" and "checking transactions that are required within the Federal Reserve bank system to clear *at par*" when prescribing standards used to assess whether an interchange transaction fee is reasonable and

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[32] Conversely, if Congress had intended to provide the Board with discretion to consider additional, unspecified costs "that are specific to a particular electronic debit transaction but that are not incremental ACS costs," as the Board contends, Def.'s Mem. at 17, then Congress would have told the Board to report its findings concerning those costs, too.

proportional to the issuer's transactions. § 1693o-2(a)(4)(A) (emphasis added). The Board is thus *required* to consider how debit and checking transactions are "like" or "[r]esembling though not completely identical" in terms of their "capab[ility] of performing" or "ab[ility] to perform a regular function."[33] Congress understood that debit card transactions are "akin to writing a check" because "[a]ll that happens . . . is you deduct money from your bank account." *See* 156 Cong. Rec. S3,696 (daily ed. May 13, 2010) (statement of Sen. Richard J. Durbin) ("That is why debit cards are advertised as check cards."). However, as Senator Durbin explained, "there are zero transaction fees deducted when you use a check," unlike interchange fees, which "are deducted from every [debit] transaction left for the seller." *Id.* The Board even proposed in its NPRM to limit "allowable costs ... to those that the statute specifically allows to be considered, and *not be expanded to include additional costs that a payor's bank in a check transaction would not recoup through fees from the payee's bank.*" 75 Fed. Reg. at 81,735 (emphasis added).

The Board argues that the plain language of subsection (a)(4)(A) merely requires the Board to

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[33] *Webster's New College Dictionary* 1053 (3d ed. 2008) ("similar" defined as "like; resembling though not completely identical"); *id.* 462 (defining "functional" as "designed for or adapted for a specific function or use; capable of performing; operative"); *Merriam-Webster's Collegiate Dictionary* 507 (11th ed. 2009) ("functional" means "performing or able to perform a regular function").

consider the functional similarity between electronic debit transactions and checking transactions in determining its interchange fee standard (which it did) and does not preclude the Board's consideration of differences. "Were courts to *presume* a delegation of power absent an express *withholding* of such power," however, "agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron*[.]" Ry. *Labor Execs. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655,671 (D.C. Cir. 1994); *see also Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) ("[I]f there is the sort of ambiguity that supports an implicit congressional delegation of authority to the agency to make a deference-worthy interpretation of the statute, we must look elsewhere than the [statute's] failure to negate[.]"). In fact, it defies common sense to read an explicit directive to consider "functional *similarity*" as authorization to consider *differences*, as well

Lastly, subsection (a)(5)(A)(i) directs the Board "to make allowance for costs incurred by the issuer in preventing fraud" via an "*adjustment* to the fee amount received or charged by an issuer" under the interchange fee standard. § 1693o-2(a)(5)(A)(i) (emphasis added). At first glance, Congress's choice of words here appears to sanction a wholesale inclusion of fraud-prevention costs within the interchange transaction fee standard. However, subsection (a)(5)(A)(i) limits "any fraud-related adjustment" to the amount "reasonably necessary . . . to prevent[] fraud in relation to electronic debit transactions involving that issuer," and (a)(5)(A)(ii) conditions that adjustment on an issuer's compliance with fraud-related standards that "require issuers to take effective steps to reduce the occurrences and costs of, and costs from, fraud in relation to electronic debit transactions." § 1693o-2(a)(5)(A)(i)-(ii). Senator Durbin's discussion of subsection (a)(5) sheds further light on this provision:

> It should be noted that any fraud prevention adjustment to the fee amount would occur *after* the base calculation of the reasonable and proportional interchange fee amount takes place, and fraud prevention costs *would not be considered* as part of the incremental issuer costs upon which the reasonable and proportional fee amount is based. Further, *any* fraud prevention cost adjustment would be made on an *issuer-specific basis*, as each issuer must individually demonstrate that it complies with the standards established by the Board, and as the adjustment would be limited to what is reasonably necessary to make allowance for fraud prevention costs incurred by that particular issuer.

156 Cong Rec. S5,925 (daily ed. July 15, 2010) (statement of Sen. Richard J. Durbin) (emphases added); *see also* Durbin Comments, *supra* note 5, at 9.

Accordingly, I find that the text and structure of the Durbin Amendment, as reinforced by its legislative history, are clear with regard to what costs the Board may consider in setting the interchange fee standard: Incremental ACS costs of individual transactions incurred by issuers may be considered. That's it!

B. The Board's Interchange Fee Regulation Accounts for Costs That Are Unambiguously Foreclosed from Consideration by Congress.

The Durbin Amendment is explicit about what costs the Board could consider in setting the interchange transaction fee, and the Board was required "to give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. As the "final authority on issues of statutory construction," federal courts are charged with "reject[ing] administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9. For the following reasons, I reject the Board's construction of the Durbin Amendment as non-compliant with Congress's clear mandate.

First, the Board's understanding that a third category of costs can be recovered under the interchange transaction fee standard is irreconcilable with the statute. In its Final Rule, the Board concluded that it could, in its discretion, factor into the interchange fee any costs "that are specific to a particular electronic debit transaction but that are not incremental costs related to the issuer's role in authorization, clearance, and settlement." 76 Fed. Reg. at 43,426. According to the Board, the statute is silent as to costs not addressed in§ 1693o-2(a)(4)(B)(i) or (ii), and Congress did "not restrict the factors the Board may consider in establishing standards for assessing whether interchange transaction fees are reasonable and proportional to cost." 76 Fed. Reg. at 43,424.[34]

In exercising this purported discretion, the Board reads the statutory language prohibiting it from considering costs "not specific to a *particular* electronic debit transaction,"§ 1693o-2(a)(4)(B)(ii), as prohibiting it from considering only "those costs that are not incurred in the course of effecting *any* electronic debit transaction," 76 Fed. Reg. at 43,426 (emphasis added). The Board, to its credit, still *did not* consider costs associated with corporate overhead (*e.g.*, executive compensation), establishing and maintaining an account relationship, debit card production and delivery, marketing, research and development, insufficient funds handling, network membership fees, reward programs, and customer support, *id.* at 43,427-29. But the Board *did*, contrary to the expressed will of Congress, consider "*any cost that is not prohibited–i.e.*, any cost that is incurred in the course of effecting an electronic debit

[34] *See also id.* at 43,426-27 ("[T]he requirement that one set of costs be considered and another set of costs be excluded suggests that Congress left to the implementing agency discretion to consider costs that fall into neither category to the extent necessary and appropriate to fulfill the purposes of the statute. . . . By considering all costs for which it had data other than prohibited costs, the Board has complied with the statutory mandate not to consider costs identified in [(a)(4)(B)(ii)], has fulfilled the statutory mandate requiring consideration of the costs identified in [(a)(4)(B)(i)], and has chosen to consider other costs specific to particular electronic debit transactions to the extent consistent with the purpose of the statute, in establishing its [interchange transaction fee] standard.").

transaction," *id.* at 43,426, including fixed costs (*i.e.*, network connectivity and software, hardware, equipment, and associated labor), network processing fees, transaction monitoring, and fraud losses, *id.* at 43,429-31. As a result, the final regulation sets a maximum fee that an issuer could recover at twenty-one cents ($.21) per transaction, plus an *ad valorem* amount of .05% of each transaction's value, 12 C.F.R. § 235.3(b); 76 Fed. Reg. at 43,422–well above the NPRM's seven- ($.07) and twelve-cent ($.12) proposals, 75 Fed. Reg. at 81,736-38.

This interpretation runs completely afoul of the text, design and purpose of the Durbin Amendment. By improperly narrowing the scope of *excluded* costs in subsection (a)(4)(B)(ii) to only those costs "not incurred in the course of effecting *any* electronic debit transaction," the Board expanded the range of *allowable* costs in subsection (a)(4)(B)(i) to "*any* cost that is incurred in the course of effecting an electronic debit transaction." 76 Fed. Reg. at 43,326. In so doing, the Board not only ignored critical statutory terms such as "distinguish between," "other," "specific," "particular," "incremental," and "authorization, clearance, or settlement"[35]—which provide clear guidance, *see supra* pp. 28-30–but also

[35] The Board somehow found that it was "not ... necessary to determine whether costs are 'incremental,' fixed or variable, or incurred in connection with authorization, clearance, and settlement," 76 Fed. Reg. at 43,427, even though those are operative words in the statute.

shoehorned a whole array of excluded costs into the interchange fee standard.

Under the Final Rule, it is inconsequential whether costs are variable and result only from an individual transaction or are fixed and common to all transactions; so long as a cost is incurred to effect "debit card transactions as a whole," the Board concluded that it may be considered in its interchange fee standard. 76 Fed. Reg. at 43,426; *see also* Def.'s Mem. at 27 ("The Board further determined that a cost is specific to a particular electronic debit transaction if no such transaction can occur without incurring that cost."). Please! This reading of the law contradicts Congress's clear mandate that the Board is precluded from considering all costs, other than an issuer's *variable ACS* costs related to an *individual* debit transaction, in setting the interchange standard. Costs that are "not specific *to a particular debit transaction*,"§ 1693o-2(a)(4)(B)(ii) (emphasis added), simply are not the same as costs that are "not specific *to debit transactions as a whole*," 76 Fed. Reg. at 43,426 (emphasis added). And "the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction,"§ 1693o-2(a)(4)(B)(i), is not the same as "any cost that is incurred in the course of effecting an electronic debit transaction," 76 Fed. Reg. at 43,426 (emphasis added).

In short, the Board's interpretation is utterly indefensible. As explained above, the statute is *not* silent or ambiguous. Rather, the plain text of subsection (a)(4)(B) and the statutory structure and legislative history of the Durbin Amendment clearly demonstrate that Congress intended for the Board to exclude *all* "other costs" not specified in the statute as requiring consideration in the interchange transaction fee standard. That Congress could have used other, more definitive language, as the Board argues, *see* Def.'s Mem. at 18-19, is irrelevant when its statutory import is nonetheless clear. [36] "[When] the agency has either violated Congress's precise instructions or exceeded the statute's clear boundaries then, as *Chevron* puts it, 'that is the end of the matter'—the agency's interpretation is unlawful." *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011) (quoting 467 U.S. at 842).[37] And it is quite clear that the statute

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[36] *See* Locke, 471 U.S. at 95 ("[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do."); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context .... "); *S. Cal. Edison Co. v. FERC*, 195 F.3d 17,24 (D.C. Cir. 1999) ("[T]he court has repeatedly rejected the notion that the absence of an express proscription allows an agency to ignore a proscription implied by the limiting language of a statute[.]"); *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) ("[I]f[the text] clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is 'silent' in the *Chevron* sense.").

[37] Moreover, *Chevron* step two is not implicated whenever a statute does not expressly negate the existence of a claimed administrative power, as the Board would have me believe. Rather, "it is only legislative intent to delegate such authority that entitles an agency to advance its own statutory

(Continued . . .)

did not allow the Board to consider the additional costs factored into the interchange fee standard–*i.e.*, (1) fixed ACS costs, (2) transaction monitoring costs, (3) an allowance for an issuer's fraud losses, and (4) network processing fees. 76 Fed. Reg. at 43,429-31. How so?

(1) Fixed ACS Costs. The final interchange fee standard includes *total* transaction processing costs, including costs reported as variable *and fixed* ACS costs, within allowable interchange fees. *Id.* at 43,429. Instead of citing statutory text to justify this interpretation of the law, the Board simply noted that it is administratively difficult to discern a transaction's incremental ACS costs. *See id.* at 43,426-27; Def.'s Mem. at 32–33, 41. But Congress instructed the Board to consider only *variable* ACS costs incurred for the issuer's role in processing a particular transaction. *See supra* pp. 32-33. The legislative mandate to consider incremental ACS costs in setting the interchange standard is not a

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construction for review under the deferential second prong of *Chevron*." *City of Kan. City, Mo. v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 191-92 (D.C. Cir. 1991); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("We refuse, once again, to presume a delegation of power merely because Congress has not expressly withheld such power."). Put simply by plaintiffs, "[t]here is no indication in the Durbin Amendment's text, purpose, or legislative history that Congress meant, by carefully delineating the cost factors that the Board must consider and not consider in setting an interchange fee standard, to delegate to the Board by what it *did not say* the unbounded discretion to consider any other cost factor relating to a debit card transaction." Pls.' Mem. at 37.

"minimum," as the Board argues, *see* Def.'s Mem. at 29, but rather a *ceiling*. The fact that "there is simply no bright line test to identify exactly ACS versus non-ACS costs," *id.* at 33, or that the Board "provided a reasoned explanation for considering certain fixed costs and excluding others," *id.* at 30, does not empower the Board to flout the statute and then brandish its *Chevron* defense. *See Chevron*, 467 U.S. at 843-44; *Vill. of Barrington*, 636 F.3d at 659-60. The Board's inclusion of fixed ACS costs in the interchange transaction fee standard was impermissible.

(2) Transaction Monitoring Costs. The Board also included transaction monitoring costs–*i.e.*, the costs of fraud-prevention activities that authenticate the cardholder and confirm whether a debit card is valid[38]-in the final standard because such costs are related to the authorization of a particular transaction. 76 Fed. Reg. at 43,430-31. But according to the statutory language and the final Conference Report, Congress allowed for fraud-prevention costs only as a *separate adjustment to*, rather than a component of, the interchange transaction fee standard, and only *if* the issuer complies with fraud-related standards established by the Board. *See*

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[38] In both its NPRM and Final Rule, the Board classified transaction monitoring as fraud prevention activity. *See* 75 Fed. Reg. at 81,741 ("[I]ssuers engage in a variety of fraud prevention activities .... such as transaction monitoring[.]"); 76 Fed. Reg. at 43,397 ("The most commonly reported fraud-prevention activity was transaction monitoring.").

§ 1693o-2(a)(5)(A); *supra* pp. 11-12, 36-37. In fact, subsection (a)(5)'s adjustment to the interchange fee for fraud-prevention costs was the subject of a distinct rulemaking. *See* 77 Fed. Reg. 46,258; 12 C.P.R. § 235.4; *supra* notes 9, 19 and accompanying text.

Although the Board recognizes that the plain language of subsection (a)(5)(A) provides a separate adjustment to the interchange transaction fee standard for fraud prevention costs, it nonetheless takes the position that the statute does not prohibit the consideration of those costs when setting the interchange fee standard. *See* Def.'s Mem. at 43. No so. It would be nonsensical for Congress to make fraud-prevention costs the basis for a *conditional adjustment* to the interchange fee standard, and at the same time implicitly allow for fraud-prevention costs to factor into the standard itself without any conditions being met. To the contrary, by linking the fraud-prevention adjustment with a statutory requirement that the issuer comply with fraud-related standards, Congress sought to prevent what the Board has allowed: rewarding *every* issuer with an interchange fee increase to cover fraud-prevention costs, regardless of whether the issuer complies with the fraud-related standards established under subsection (a)(5)(B). As Senator Durbin explained in a comment letter, "The current system of network established interchange fees creates precisely the wrong incentives for issuers when it comes to fraud prevention" because "[u]nder the current system, all issuing banks in a network receive the same network-established interchange fee rates" regardless of whether they minimize actual fraud.

Durbin Comments, *supra* note 5, at 9. "In contrast to the current inefficient system, [15 U.S.C. §1693o-2(a)(5)] will incentivize regulated issuing banks to reduce fraud by allowing banks that take successful fraud prevention steps to receive increased interchange fees." *Id.*[39]

(3) Allowance for Fraud Losses. The Board also included an allowance for fraud losses, or "losses incurred by the issuer, other than losses related to nonsufficient funds, that are not recovered through chargebacks to merchants or debits to or collections from customers," such as losses associated with lost, stolen, or counterfeit card fraud. *Id.* Not proposed for inclusion as an allowable cost in its NPRM, the Board concluded that fraud losses should be considered within the final interchange transaction fee standard because they "are generally the *result* of the authorization, clearance, and settlement of an apparently valid transaction that the cardholder later identifies as fraudulent." *Id.* (emphasis added). But the costs associated with the *consequence* of ACS–as opposed to ACS costs themselves-are not to be considered under the plain language of the statute. The Board's decision to "[p]ermit[] issuers to recover at least some fraud losses through interchange fees . . . given that the source of fraud

[39] The Board tries to distinguish transaction monitoring from the types of activities considered under the separate fraud-prevention rulemaking, thereby rationalizing the inclusion of transaction monitoring costs in the interchange fee. *See* 76 Fed. Reg. at 43,431. But the statute provides no basis for this distinction.

could be any participant in an electronic debit transaction and that the exact source of fraud often is unknown," 76 Fed. Reg. at 43,431, is a blatant act of policymaking that runs counter to Congress's will.

(4) Network Processing Fees. Finally, the Board included network processing fees in the interchange fee standard because they are incurred for the issuer's role in ACS and are specific to a particular transaction. 76 Fed. Reg. at 43,430. Again, this ignores the plain language of the statute, which demonstrates that Congress did not intend for network fees to be incorporated into the interchange transaction fee standard. Under the statute's definitional provisions, a "network fee" is "any fee charged and received by a payment card network with respect to an electronic debit transaction, *other than an interchange transaction fee*." § 1693o-2(c)(l0) (emphasis added). Furthermore, subsection (a)(4)(B)(i) of the statute limits the Board's authority to permit recovery of issuer costs to those incurred "for the role of the *issuer*," not the *network*, in processing a transaction. § l693o-2(a)(4)(B)(i) (emphasis added); *see supra* p. 32-33. Last, subsection (a)(8)(B) states that the only authority Congress granted the Board to issue regulations regarding network fees is "to ensure that "(i) a network fee is not used to directly or indirectly compensate an issuer with respect to an electronic debit transaction; and (ii) a network fee is not used to circumvent or evade the restrictions of this subsection and regulations prescribed under such subsection." § 1693o-2(a)(8)(B). Thus, the interchange fee cannot be used to compensate an issuer for network fees.

Ultimately, the Board asserts that it was given broad discretion to fill statutory gaps in establishing the interchange transaction fee standard. *See* Def.'s Mem. at 23-26. But even if this were true, which it is not, such discretion does not give the Board the authority to ignore the expressed will of Congress. *See Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute."); *Ry. Labor Execs. Ass'n*, 29 F .3d at 671 ("'Congress has directly spoken to the precise question at issue' in this case ... so there is no gap for the agency to fill." (citation omitted)). By including in the interchange fee standard costs that are expressly prohibited by the statute, the final regulation represents a significant price *increase* over pre-Durbin Amendment rates for small-ticket debit transactions under the $12 threshold. *See* 7-Eleven Amicus Br. at 17- 18; *see also* Durbin Amicus Br. at 23 ("[B]y setting a high fee cap that far exceeds the customary fees levied on small ticket transactions, the [Board] has given its regulatory blessing to the setting of interchange rates by Visa and MasterCard that are over three times larger than rates previously charged on small dollar transactions."). Congress did not empower the Board to make policy judgments that would result in significantly *higher* interchange rates. Accordingly, the Board's interpretation of the interchange fee standard is foreclosed by the law and must be invalidated under *Chevron's* first step.

III. The Network Non-Exclusivity Regulation Is Invalid Under the APA.

Subsection (b)(1)(A) of the Durbin Amendment directs the Board to issue regulations prohibiting issuers and networks from "restrict[ing] the number of payment card networks on which an electronic debit transaction may be processed" to one network or multiple affiliated networks. § 1693o-2(b)(l)(A). Subsection (b)(l)(B), meanwhile, instructs the Board to promulgate regulations that prohibit issuers and networks from "inhibit[ing] the ability of any person who accepts debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions." § 1693o-2(b)(l)(B). The Board determined that subsection (b)(l)(A) requires issuers and networks to make available two unaffiliated networks for *each debit card*, not for *each method of authentication* (signature and PIN). 12 C.P.R.§ 235.7(a)(2) & Official Cmt. 1; *see also* 76 Fed. Reg. at 43,404,43,447-48.

Plaintiffs argue that this interpretation disregards the statute's language and purpose, which require that merchants be given a choice between multiple unaffiliated networks not only for each card, but for each *transaction*. They say that the Board's non-exclusivity regulation cannot survive *Chevron* step one because it contravenes both the letter and spirit of the Durbin Amendment. The Board characterizes plaintiffs' arguments as being "unmoored from the statutory text," which the Board says is ambiguous on this issue. Moreover, the Board claims that its interpretation of the law is permissible and fully implements Congress's directive. I disagree. The plaintiffs' interpretation is, in my judgment, the one true to Congress's intent. How so?

A. The Statute Requires that Merchants Be Provided with a Choice Between Multiple Unaffiliated Networks for Each Transaction.

First, the Court must determine "whether Congress has directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 84, by considering whether "the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill," *Nat 'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). In determining whether Congress has spoken to the issue, the Court, of course, begins with the plain meaning of the statutory text. *S. Cal. Edison*, 195 F.3d at 23.

The language of the network non-exclusivity provision favors the plaintiffs' interpretation at *Chevron* step one. First, there is no question that subsection (b)(1)(A) mandates that "an issuer or payment card network shall not ... restrict the number of payment card networks on which an electronic debit *transaction* may be processed" to fewer than two unaffiliated networks, and that the Board must promulgate regulations to enforce this restriction. § 1693o-2(b)(l)(A) (emphasis added); *see Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1243 (D.C. Cir. 2009) ("'Shall' has long been understood as 'the language of command.'" (citation omitted)). Put differently, the statute instructs the Board to ensure that issuers and networks stop restricting merchants' ability to route *each transaction* over different networks. Congress's focus was on the number of networks over which each *transaction*—as opposed to each debit card—can be processed.

Although the Board admits that the statute calls for debit cards to be able to function over two or more unaffiliated networks, it insists that the law is silent as to whether merchants must have routing choices for each transaction. Def.'s Reply to Pls.' Reply Mem. in Supp. of Pls.' Mot. for Summ. J. and in Opp'n to Def.'s Mot. for Summ. J. ("Def.'s Reply") at 31 [Dkt. # 32]. Congress resolved this uncertainty, however, by using the statutorily defined term "electronic debit transaction." *See* § 1693o-2(c)(5) (defining "electronic debit transaction" as "a transaction in which a person uses a debit card"); *id.* § 1693o-2(c)(2)(A) ("debit card" defined as "any card ... issued or approved for use through a payment card network to debit an asset account ... whether authorization is based on signature, PIN, or other means"). When the definitions are read into the statute, subsection (b)(1)(A) provides that networks and issuers "shall not ... restrict the number of payment card networks [to process] '*a transaction* in which a person uses [any card ... issued or approved for use through a payment card network to debit an asset account . . . *whether authorization is based on signature, PIN, or other means*]'" to less than two unaffiliated networks. The plain text of the statute thus supports the conclusion that Congress intended for each transaction to be routed over at least two competing networks for each authorization method.

Indeed, the Durbin Amendment's legislative history confirms my reading of the statute. It is axiomatic when interpreting a Congressional statute that this Court must consider, among other things, the problem Congress sought to resolve when it adopted the law at issue. *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 796 (D.C. Cir. 2004). Even when the statute's plain meaning is clear from its terms, legislative history can be "equally illuminating." *Planned Parenthood Fed'n of Am., Inc. v. Heckler*, 712 F.2d 650, 656-57 (D.C. Cir. 1983).

As Senator Durbin explained, the Amendment was enacted at a time when network fees were on the rise due to exclusivity deals between dominant card networks and issuers.[40] Total network fees exceeded $4.1 billion in 2009, 76 Fed. Reg. at 43,397, due in large part to the lack of competition resulting from exclusivity agreements. As the Board explained in its NPRM:

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[40] *See* 156 Cong. Rec. S10,996 (daily ed. Dec. 22, 2010) (statement of Senator Richard J. Durbin) ("In recent years ... the biggest networks like Visa have begun requiring banks to sign exclusive agreements under which they become the sole network on the banks' cards. This diminishes competition between networks and leads to higher prices. My amendment will restore this competition."); *see also* Durbin Comments, *supra* note 5, at 11 ("This trend toward exclusivity agreements . . . limits merchant and consumer choice; it diminishes competition by threatening to drive competing debit networks out of business; and it creates significant barriers to entry for new debit networks." (citation and internal quotation marks omitted)).

> From the merchant perspective, the availability of multiple card networks on a debit card is attractive because it gives merchants the flexibility to route transactions over the network that will result in the lowest cost to the merchant. This flexibility may promote direct price competition among the debit card networks that are enabled on the debit card. Thus, debit card network exclusivity arrangements limit merchants' ability to route transactions over lower-cost networks and may reduce price competition.

75 Fed. Reg. at 81,748.

Congress adopted the network non-exclusivity and routing provisions "to inhibit the continued consolidation of the dominant debit networks' market power and to ensure competition and choice in the debit network market." Durbin Comments, *supra* note 5, at 11; *see also* 156 Cong. Rec. S5,926 (daily ed. July 15, 2010) (statement of Sen. Richard J. Durbin) ("All these provisions say is that [f]ederal law now blocks payment card networks from engaging in certain specific enumerated anti-competitive practices, and the provisions describe precisely the boundaries over which payment card networks cannot cross with respect to these specific practices."). It is clear that Congress intended to put an end to exclusivity agreements and increase merchants' choice among debit processing networks, not restrict that choice or even preserve the status quo.

Accordingly, it defies both the letter and purpose of the Durbin Amendment to read the statute as allowing networks and issuers to continue restricting the number of networks on which an electronic debit transaction may be processed to fewer than two per transaction. Indeed, prior to the Amendment's passage, Senator Durbin explicitly confirmed that Congress wanted subsection (b)(I)(A) to ensure the availability of at least two competing networks for each method of cardholder authentication on which an electronic debit transaction may be processed:

> This paragraph is intended to *enable each and every* electronic debit transaction—*no matter whether that transaction is authorized by signature, PIN, or otherwise*—to be run over at least two unaffiliated networks, and the Board's regulations should ensure that networks or issuers *do not try to evade the intent of this amendment by having cards that may run on only two unaffiliated networks where one of those networks is limited and cannot be used for many types of transactions.*

156 Cong. Rec. S5,926 (daily ed. July 15, 2010) (statement of Sen. Richard J. Durbin) (emphases added). In short, Congress adopted the network non-exclusivity and routing provisions to ensure that for multiple unaffiliated routing options were available for each debit card transaction, regardless of the method of authentication. The Board's Final Rule not only fails to carry out Congress's intention; it effectively countermands it!

B. The Board's Network Non-Exclusivity Regulation Is Inconsistent with the Statute.

The Board's network non-exclusivity regulation requires at least two unaffiliated payment card networks be enabled on each *debit card*, meaning that a card complies with the regulation if it has been enabled with only one PIN network and one signature network. 12 C.F.R. § 235.7(a)(2) & Official Cmt. 1; *see also* 76 Fed. Reg. at 43,447-48. According to the Board, "[t]he plain language of the statute does not require that there by two unaffiliated payment card networks available to the merchant for each method of authentication." 76 Fed. Reg. at 43,447. I disagree.

The Board's interpretation of subsection (b)(l)(A) cannot be reconciled with the plain meaning or spirit of the statute because it still allows networks and issuers to make only one network available for many transactions. Indeed, by the Board's own admission, several common transaction types cannot be authenticated using the PIN method, leaving signature-debit as the only available option. *See* 76 Fed. Reg. 43,395. "[H]otel stays or car rentals," not to mention "Internet, telephone, and mail transactions," are typically incompatible with PIN authorization technology. *Id.* Under a rule that allows issuers to provide just one signature network and one PIN network per card, merchants in these signature-only industries are left with no network options. *See* 75 Fed. Reg. at 81,748. This result cannot be reconciled with Congress's goal of providing all merchants with a choice between multiple unaffiliated networks for every transaction.

The Board contends that where a merchant can process both signature and PIN transactions, the customer determines the authentication method at the point of sale by choosing "debit" for PIN authentication or "credit" for signature authentication. 76 Fed. Reg. at 43,448. In this scenario, the Board says that its network non-exclusivity rule technically provides for multiple available networks, but "the consumer, and not the issuer or the payment card network, ... restrict[s] the available routing choices" for the merchant. *Id.* The Board forgets, however, that it is issuers and networks who establish the availability of different routing options, well before consumers ever enter the picture. And the Board cannot be relieved of its statutory obligation to ensure that network and *issuer* practices do not inhibit merchant choice simply because, in many transactions, consumers choose the authentication method. In the end, any reading that denies *merchants* the ability to choose between multiple networks for each transaction cannot be squared with a statute that plainly requires at least two networks per transaction.

The Board's network non-exclusivity regulation is also inconsistent with other related statutory provisions. For example, subsection (b)(1)(B) instructs the Board to establish regulations that bar issuers and networks from "inhibit[ing] the ability of any person who accepts debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions." § 1693o-2(b)(l)(B). This sister provision to subsection (b)(l)(A) makes sense only if merchants have a *choice* between multiple networks. It would defy all logic for Congress to safeguard merchants' ability to route transactions over the networks of their choosing while at the same time leaving it up to the Board to decide whether issuers give merchants any choice in the first place. *See Greenlaw v. United States*, 554 U.S. 23 7, 251 (2008) ("We resist attributing to Congress an intention to render a statute so internally inconsistent."); *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 575 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Even the Board has recognized that its interpretation of subsection (b)(1)(A) limits the effectiveness of subsection (b)(l)(B) under the Durbin Amendment.[41]

The Board further defends its network non-exclusivity regulation by pointing out that it is not "the most aggressively pro-merchant position" that the Board could have taken. Def.'s Reply at 27. The Board obviously misses the point! Where a court concludes that a statute is unambiguous, an agency's interpretation must be rejected if it is inconsistent with clearly expressed legislative intent. *See*

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[41] *See* 75 Fed. Reg. at 81,749-50 ("[T]he Board notes that Alternative A could limit the effectiveness of the separate prohibition on merchant routing restrictions under[§ 1693o-2(b)(1)(B)]").

Chevron, 467 U.S. at 842- 43; *Vill. of Barrington*, 636 F.3d at 659-60. It is not about whether the rule favors merchants or issuers; rather, it is about whether the rule implements Congress's will. And Congress's use of clear, defined language in the network non-exclusivity and routing provisions leaves no ambiguity or statutory gap for the agency to fill. *See United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (20 12) ("*Chevron* and later cases find in unambiguous language a clear sign that Congress did *not* delegate gap-filling authority to an agency[.]").

Lastly, the Board noted that its two-networks-per-card approach "minimiz[es] the compliance burden on institutions" and "present[s] less logistical burden on the payment system overall as it would require little if any re-programming of routing logic" than would a rule requiring two networks for each payment type. 76 Fed. Reg. at 43,447. That might be the case, but the law does not impose those burdens. In fact, the Durbin Amendment does not specify how the Board should go about achieving the statute's requirement. It was possible for the Board to implement the law without requiring brand new networks be added to each card. As explained during the comment period on the NPRM, the Board could have guaranteed "multiple routing options for every transaction by barring the dominant networks' anti-competitive rules to allow PIN-only networks to process signature transactions, and vice versa." Pl.'s

Mem. at 51.[42] In other words, the Board could have required networks to allow cross-routing of signature and PIN transactions, thereby ensuring that each debit card had multiple unaffiliated dual message network options on which every type of debit transaction could be processed. The Board chose instead to adopt a different approach-one that, unfortunately, is inconsistent with the statute. The final network non-exclusivity regulation therefore cannot stand under *Chevron* step one. *See Catawba Cnty.*, 571 F.3d at 35.

IV. The Appropriate Remedy Is Vacatur and Remand, Staying Vacatur.

The Court concludes that the proper remedy here is to remand to the Board with instructions to vacate the Board's interchange transaction fee (12 C.F.R. § 235.3(b)) and network non-exclusivity (12 C.F.R. § 235.7(a)(2)) regulations. *See* 5 U.S.C. § 706(2) (directing that a court "shall ... set aside agency action . . . found to be arbitrary, capricious . . . or otherwise not in accordance with law."). Although I recognize that vacatur is not required by our Circuit,

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[42] *See, e.g.*, Adam J. Levitin, *Comments in Response to Notice of Proposed Rulemaking on Debit Card Interchange Fees and Routing* at 2-3 (Feb. 22, 2011) ("I would suggest that the Board also be explicit in permitting PIN debit networks to process signature-debit transactions as long as the merchant and/or network is willing to assume the chargeback risk . . . . Restricting limitations on cross-routing on debit cards between PIN and signature debit networks would enhance the competition among networks for processing transactions, which is precisely the goal of the Durbin Interchange Amendment.").

Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin., 429 F .3d 1136, 1151 (D.C. Cir. 2005), I conclude that both factors to be considered when deciding whether to vacate—(1) "the seriousness of the [regulation's] deficiencies" and (2) "the disruptive consequences of an interim change that may itself be changed," *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (citation omitted)—weigh in favor of vacating the specified regulations *before* remanding to the Board.

First, the interchange transaction fee and network non-exclusivity regulations are fundamentally deficient. It appears that the Board completely misunderstood the Durbin Amendment's statutory directive and interpreted the law in ways that were clearly foreclosed by Congress. Because "[t]he Court cannot be sure that the agency will interpret the statute in the same way and arrive at the same conclusion after further review," *Int'l Swaps & Derivatives Ass'n v. US. Commodity Futures Trading Comm'n*, No. 11-2146, 2012 WL 4466311, at *25 (D.D.C. Sept. 28, 2012), let alone whether, "on further judicial review, this or a similar Final Rule will withstand challenge under the APA," *Humane Soc'y of US. v. Kempthorne*, 579 F. Supp. 2d 7, 21 (D.D.C. 2008), this factor weighs heavily in favor of vacatur.

Second, any disruptive effect of vacatur can be curtailed by a stay. This Court is mindful that interchange and network fees are critical components of the debit card system, and that the Board's Final Rule has been in effect since October 1, 2011, such that regulated interests have already made extensive commitments in reliance on it.[43] But in light of the seriously deficient nature of the regulations at issue, and the fact that the Board must develop entirely new rules to correct these errors, remand *without* vacatur would be inappropriate here. *Compare Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002) (vacatur appropriate if rule is "irredeemable"), *with WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002) (where there is a "non-trivial likelihood" that agency could justify rule on remand, vacatur is not necessary). I will stay vacatur, however, to provide the Board an opportunity to replace the invalid portions of the Final Rule. In so doing, I can prevent the Board from adopting similar regulations while at the same time avoid the disruption of vacating the entire regime. *See Anacostia Riverkeeper, Inc. v. Jackson*, 713 F. Supp. 2d 50, 55 (D.D.C. 2010) (although pollution limits promulgated by EPA were inconsistent with Clean Water Act and thus invalid, vacatur stayed pending limits' revision because

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[43] *See* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 300 (2003) ("Frequently, when a rule is held invalid after it has already gone into effect, private citizens will already have arranged their expectations around it. Companies may have entered into contracts, made capital investments, and shifted business operations in light of the rule."); *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606, 609 (D.C. Cir. 1998) ("Here, vacating the order would leave payphone service providers all but uncompensated for coinless calls made from their payphones, and disrupt the business plans they have made on the basis of their expectation of compensation.").

"neither the Court, nor the parties, wants the ... waters at issue in this action to go without pollutant limits while EPA develops new pollutant limits, which will obviously take some time").

To properly effect the stay of vacatur, two issues remain: (1) the appropriate length of the stay; and (2) whether current standards should remain in place until they are replaced by valid regulations or the Board should develop interim standards sufficient to allow the Court to lift the stay. *See, e.g., Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 148 (D.C. Cir. 2006); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001); *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 924 (D.C. Cir. 1998); *Anacostia Riverkeeper*, 713 F. Supp. 2d at 52-55. Because the parties failed to address the proper remedy in their motions, the Court will invite supplemental briefing on these issues, keeping in mind that I am inclined toward a stay of vacatur "for months, not years," *Natural Res. Def Council v. EPA*, 489 F.3d 1250, 1265 (D.C. Cir. 2007) (Rogers, J., concurring in part and dissenting in part) (citations omitted).

CONCLUSION

For the foregoing reasons, the Court GRANTS plaintiffs' Motion for Summary Judgment and DENIES defendant's Cross-Motion for Summary Judgment. Accordingly, the Court will vacate the interchange transaction fee (12 C.F.R. § 235.3(b)) and network non-exclusivity (12 C.F.R. § 235.7(a)(2)) regulations, staying vacatur until further Order of this Court, and will remand to the Board for further proceedings consistent with this Memorandum Opinion. An appropriate order shall follow.

s/ Richard J. Leon
RICHARD J. LEON
United States District
Judge

15 U.S.C. § 1693o-2

§ 1693o-2. Reasonable fees and rules for payment card transactions

(a) Reasonable interchange transaction fees for electronic debit transactions.

(1) Regulatory authority over interchange transaction fees. The Board may prescribe regulations, pursuant to section 553 of title 5, United States Code, regarding any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction, to implement this subsection (including related definitions), and to prevent circumvention or evasion of this subsection.

(2) Reasonable interchange transaction fees. The amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction shall be reasonable and proportional to the cost incurred by the issuer with respect to the transaction.

(3) Rulemaking required.

(A) In general. The Board shall prescribe regulations in final form not later than 9 months after the date of enactment of the Consumer Financial Protection Act of 2010 [enacted July 21, 2010], to establish standards for assessing whether the amount of any interchange transaction fee described in paragraph (2) is reasonable and proportional to the cost incurred by the issuer with respect to the transaction.

(B) Information collection. The Board may require any issuer (or agent of an issuer) or payment card network to provide the Board with such information as may be necessary to carry out the provisions of this subsection and the Board, in issuing rules under subparagraph (A) and on at least a bi-annual basis thereafter, shall disclose such aggregate or summary information concerning the costs incurred, and interchange transaction fees charged or received, by issuers or payment card networks in connection with the authorization, clearance or settlement of electronic debit transactions as the Board considers appropriate and in the public interest.

(4) Considerations; consultation. In prescribing regulations under paragraph (3)(A), the Board shall--

(A) consider the functional similarity between-

(i) electronic debit transactions; and

(ii) checking transactions that are required within the Federal Reserve bank system to clear at par;

(B) distinguish between--

(i) the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction, which cost shall be considered under paragraph (2); and

(ii) other costs incurred by an issuer which are not specific to a particular electronic debit transaction, which costs shall not be considered under paragraph (2); and

(C) consult, as appropriate, with the Comptroller of the Currency, the Board of Directors of the Federal Deposit Insurance Corporation, the

Director of the Office of Thrift Supervision, the National Credit Union Administration Board, the Administrator of the Small Business Administration, and the Director of the Bureau of Consumer Financial Protection.

(5) Adjustments to interchange transaction fees for fraud prevention costs.

(A) Adjustments. The Board may allow for an adjustment to the fee amount received or charged by an issuer under paragraph (2), if--

(i) such adjustment is reasonably necessary to make allowance for costs incurred by the issuer in preventing fraud in relation to electronic debit transactions involving that issuer; and

(ii) the issuer complies with the fraud-related standards established by the Board under subparagraph (B), which standards shall--

(I) be designed to ensure that any fraud-related adjustment of the issuer is limited to the amount described in clause (i) and takes into account any fraud-related reimbursements (including amounts from charge-backs) received from consumers, merchants, or payment card networks in relation to electronic debit transactions involving the issuer; and

(II) require issuers to take effective steps to reduce the occurrence of, and costs from, fraud in relation to electronic debit transactions, including through the development and implementation of cost-effective fraud prevention technology.

(B) Rulemaking required.

(i) In general. The Board shall prescribe regulations in final form not later than 9 months after the date of enactment of the Consumer Financial Protection Act of 2010 [enacted July 21, 2010], to establish standards for making adjustments under this paragraph.

(ii) Factors for consideration. In issuing the standards and prescribing regulations under this paragraph, the Board shall consider--

(I) the nature, type, and occurrence of fraud in electronic debit transactions;

(II) the extent to which the occurrence of fraud depends on whether authorization in an electronic debit transaction is based on signature, PIN, or other means;

(III) the available and economical means by which fraud on electronic debit transactions may be reduced;

(IV) the fraud prevention and data security costs expended by each party involved in electronic debit transactions (including consumers, persons who accept debit cards as a form of payment, financial institutions, retailers and payment card networks);

(V) the costs of fraudulent transactions absorbed by each party involved in such transactions (including consumers, persons who accept debit cards as a form of payment, financial institutions, retailers and payment card networks);

(VI) the extent to which interchange transaction fees have in the past reduced or increased incentives for parties involved in electronic debit transactions to reduce fraud on such transactions; and

(VII) such other factors as the Board considers appropriate.

(6) Exemption for small issuers.

(A) In general. This subsection shall not apply to any issuer that, together with its affiliates, has assets of less than $ 10,000,000,000, and the Board shall exempt such issuers from regulations prescribed under paragraph (3)(A).

(B) Definition. For purposes of this paragraph, the term "issuer" shall be limited to the person holding the asset account that is debited through an electronic debit transaction.

(7) Exemption for government-administered payment programs and reloadable prepaid cards.

(A) In general. This subsection shall not apply to an interchange transaction fee charged or received with respect to an electronic debit transaction in which a person uses--

(i) a debit card or general-use prepaid card that has been provided to a person pursuant to a Federal, State or local government-administered payment program, in which the person may only use the debit card or general-use prepaid card to transfer or debit funds, monetary value, or other assets that have been provided pursuant to such program; or

(ii) a plastic card, payment code, or device that is--

(I) linked to funds, monetary value, or assets which are purchased or loaded on a prepaid basis;

(II) not issued or approved for use to access or debit any account held by or for the benefit of the card holder (other than a subaccount or other method of recording or tracking funds purchased or loaded on the card on a prepaid basis);

(III) redeemable at multiple, unaffiliated merchants or service providers, or automated teller machines;

(IV) used to transfer or debit funds, monetary value, or other assets; and

(V) reloadable and not marketed or labeled as a gift card or gift certificate.

(B) Exception. Notwithstanding subparagraph (A), after the end of the 1-year period beginning on the effective date provided in paragraph (9), this subsection shall apply to an interchange transaction fee charged or received with respect to an electronic debit transaction described in subparagraph (A)(i) in which a person uses a general-use prepaid card, or an electronic debit transaction described in subparagraph (A)(ii), if any of the following fees may be charged to a person with respect to the card:

(i) A fee for an overdraft, including a shortage of funds or a transaction processed for an amount exceeding the account balance.

(ii) A fee imposed by the issuer for the first withdrawal per month from an automated teller machine that is part of the issuer's designated automated teller machine network.

(C) Definition. For purposes of subparagraph (B), the term "designated automated teller machine network" means either--

(i) all automated teller machines identified in the name of the issuer; or

(ii) any network of automated teller machines identified by the issuer that provides reasonable and convenient access to the issuer's customers.

(D) Reporting. Beginning 12 months after the date of enactment of the Consumer Financial Protection Act of 2010 [enacted July 21, 2010], the Board shall annually provide a report to the Congress regarding --

(i) the prevalence of the use of general-use prepaid cards in Federal, State or local government-administered payment programs; and

(ii) the interchange transaction fees and cardholder fees charged with respect to the use of such general-use prepaid cards.

(8) Regulatory authority over network fees.

(A) In general. The Board may prescribe regulations, pursuant to section 553 of title 5, United States Code, regarding any network fee.

(B) Limitation. The authority under subparagraph (A) to prescribe regulations shall be limited to regulations to ensure that--

(i) a network fee is not used to directly or indirectly compensate an issuer with respect to an electronic debit transaction; and

(ii) a network fee is not used to circumvent or evade the restrictions of this subsection and regulations prescribed under such subsection.

(C) Rulemaking required. The Board shall prescribe regulations in final form before the end of the 9-month period beginning on the date of the enactment of the Consumer Financial Protection Act of 2010 [enacted July 21, 2010], to carry out the authorities provided under subparagraph (A).

(9) Effective date. This subsection shall take effect at the end of the 12-month period beginning on the date of the enactment of the Consumer Financial Protection Act of 2010 [enacted July 21, 2010].

(b) Limitation on payment card network restrictions.

(1) Prohibitions against exclusivity arrangements.

(A) No exclusive network. The Board shall, before the end of the 1-year period beginning on the date of the enactment of the Consumer Financial Protection Act of 2010 [enacted July 21, 2010], prescribe regulations providing that an issuer or payment card network shall not directly or through any agent, processor, or licensed member of a payment card network, by contract, requirement, condition, penalty, or otherwise, restrict the number of payment card networks on which an electronic debit transaction may be processed to--

(i) 1 such network; or

(ii) 2 or more such networks which are owned, controlled, or otherwise operated by-

(I) affiliated persons; or

(II) networks affiliated with such issuer.

(B) No routing restrictions. The Board shall, before the end of the 1-year period beginning on the date of the enactment of the Consumer Financial Protection Act of 2010 [enacted July 21, 2010], prescribe regulations providing that an issuer or payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person who accepts debit cards for payments to direct the routing of electronic debit transactions for processing over any payment card network that may process such transactions.

(2) Limitation on restrictions on offering discounts for use of a form of payment.

(A) In general. A payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person to provide a discount or in-kind incentive for payment by the use of cash, checks, debit cards, or credit cards to the extent that-

(i) in the case of a discount or in-kind incentive for payment by the use of debit cards, the discount or in-kind incentive does not differentiate on the basis of the issuer or the payment card network;

(ii) in the case of a discount or in-kind incentive for payment by the use of credit cards, the discount or in-kind incentive does not differentiate on the basis of the issuer or the payment card network; and

(iii) to the extent required by Federal law and applicable State law, such discount or in-kind incentive is offered to all prospective buyers and disclosed clearly and conspicuously.

(B) Lawful discounts. For purposes of this paragraph, the network may not penalize any person for the providing of a discount that is in compliance with Federal law and applicable State law.

(3) Limitation on restrictions on setting transaction minimums or maximums.

(A) In general. A payment card network shall not, directly or through any agent, processor, or licensed member of the network, by contract, requirement, condition, penalty, or otherwise, inhibit the ability--

(i) of any person to set a minimum dollar value for the acceptance by that person of credit cards, to the extent that --

(I) such minimum dollar value does not differentiate between issuers or between payment card networks; and

(II) such minimum dollar value does not exceed $ 10.00; or

(ii) of any Federal agency or institution of higher education to set a maximum dollar value for the acceptance by that Federal agency or institution of higher education of credit cards, to the extent that such maximum dollar value does not differentiate between issuers or between payment card networks.

(B) Increase in minimum dollar amount. The Board may, by regulation prescribed pursuant to section 553 of title 5, United States Code, increase the amount of the dollar value listed in subparagraph (A)(i)(II).

(4) Rule of construction[:]. No provision of this subsection shall be construed to authorize any person--

(A) to discriminate between debit cards within a payment card network on the basis of the issuer that issued the debit card; or

(B) to discriminate between credit cards within a payment card network on the basis of the issuer that issued the credit card.

(c) Definitions. For purposes of this section, the following definitions shall apply:

(1) Affiliate. The term "affiliate" means any company that controls, is controlled by, or is under common control with another company.

(2) Debit card. The term "debit card"--

(A) means any card, or other payment code or device, issued or approved for use through a payment card network to debit an asset account (regardless of the purpose for which the account is established), whether authorization is based on signature, PIN, or other means;

(B) includes a general-use prepaid card, as that term is defined in section 915(a)(2)(A) [15 USCS § 1693m(a)(2)(A)]; and

(C) does not include paper checks.

(3) Credit card. The term "credit card" has the same meaning as in section 103 of the Truth in Lending Act [15 USCS § 1602].

(4) Discount. The term "discount"--

(A) means a reduction made from the price that customers are informed is the regular price; and

(B) does not include any means of increasing the price that customers are informed is the regular price.

(5) Electronic debit transaction. The term "electronic debit transaction" means a transaction in which a person uses a debit card.

(6) Federal agency. The term "Federal agency" means--

(A) an agency (as defined in section 101 of title 31, United States Code); and

(B) a Government corporation (as defined in section 103 of title 5, United States Code).

(7) Institution of higher education. The term "institution of higher education" has the same meaning as in 101 and 102 of the Higher Education Act of 1965 (20 U.S.C. 1001, 1002).

(8) Interchange transaction fee. The term "interchange transaction fee" means any fee established, charged or received by a payment card network for the purpose of compensating an issuer for its involvement in an electronic debit transaction.

(9) Issuer. The term "issuer" means any person who issues a debit card, or credit card, or the agent of such person with respect to such card.

(10) Network fee. The term "network fee" means any fee charged and received by a payment card network with respect to an electronic debit transaction, other than an interchange transaction fee.

(11) Payment card network. The term "payment card network" means an entity that directly, or through licensed members, processors, or agents, provides the proprietary services, infrastructure, and software that route information and data to conduct debit card or credit card transaction authorization, clearance, and settlement, and that a person uses in order to accept as a form of payment a brand of debit card, credit card or other device that may be used to carry out debit or credit transactions.

(d) Enforcement.

(1) In general. Compliance with the requirements imposed under this section shall be enforced under section 918 [15 USCS § 1693o].

(2) Exception. Sections 916 and 917 [15 USCS §§ 1693m and 1693n] shall not apply with respect to this section or the requirements imposed pursuant to this section.

CREDIT(S):

May 29, 1968, P.L. 90-321, Title IX, § 920, as added July 21, 2010, P.L. 111-203, Title X, Subtitle G, § 1075(a)(2), 124 Stat. 2068.

CODE OF FEDERAL REGULATIONS
TITLE 12 § 235–BANKS AND BANKING
CHAPTER II—FEDERAL RESERVE SYSTEM
SUBCHAPTER A—BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM
PART 235—DEBIT CARD INTERCHANGE
FEES AND ROUTING
Current through January 1, 2014; 76 FR 43466

§ 235.1 Authority and purpose.

(a) *Authority*. This part is issued by the Board of Governors of the Federal Reserve System (Board) under section 920 of the Electronic Fund Transfer Act (EFTA) (15 U.S.C. 1693o-2, as added by section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010)).

(b) *Purpose*. This part implements the provisions of section 920 of the EFTA, including standards for reasonable and proportional interchange transaction fees for electronic debit transactions, standards for receiving a fraud-prevention adjustment to interchange transaction fees, exemptions from the interchange transaction fee limitations, prohibitions on evasion and circumvention, prohibitions on payment card network exclusivity arrangements and routing restrictions for debit card transactions, and reporting requirements for debit card issuers and payment card networks.

§ 235.2 Definitions.

For purposes of this part:

(a) *Account* (1) Means a transaction, savings, or other asset account (other than an occasional or incidental credit balance in a credit plan) established for any purpose and that is located in the United States; and

(2) Does not include an account held under a bona fide trust agreement that is excluded by section 903(2) of the Electronic Fund Transfer Act and rules prescribed thereunder.

(b) *Acquirer* means a person that contracts directly or indirectly with a merchant to provide settlement for the merchant's electronic debit transactions over a payment card network. An acquirer does not include a person that acts only as a processor for the services it provides to the merchant.

(c) *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

(d) *Cardholder* means the person to whom a debit card is issued.

(e) Control of a company means—

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting security of the company, directly or indirectly, or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general

partners (or individuals exercising similar functions) of the company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the company, as the Board determines.

(f) *Debit card* (1) Means any card, or other payment code or device, issued or approved for use through a payment card network to debit an account, regardless of whether authorization is based on signature, personal identification number (PIN), or other means, and regardless of whether the issuer holds the account, and

(2) Includes any general-use prepaid card; and

(3) Does not include—

(i) Any card, or other payment code or device, that is redeemable upon presentation at only a single merchant or an affiliated group of merchants for goods or services; or

(ii) A check, draft, or similar paper instrument, or an electronic representation thereof.

(g) *Designated automated teller machine (ATM) network* means either—

(1) All ATMs identified in the name of the issuer; or

(2) Any network of ATMs identified by the issuer that provides reasonable and convenient access to the issuer's customers.

(h) *Electronic debit transaction* (1) Means the use of a debit card by a person as a form of payment in the United States to initiate a debit to an account, and

(2) Does not include transactions initiated at an ATM, including cash withdrawals and balance transfers initiated at an ATM.

(i) *General-use prepaid card* means a card, or other payment code or device, that is—

(1) Issued on a prepaid basis in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and

(2) Redeemable upon presentation at multiple, unaffiliated merchants for goods or services.

(j) *Interchange transaction fee* means any fee established, charged, or received by a payment card network and paid by a merchant or an acquirer for the purpose of compensating an issuer for its involvement in an electronic debit transaction.

(k) *Issuer* means any person that authorizes the use of a debit card to perform an electronic debit transaction.

(l) *Merchant* means any person that accepts debit cards as payment.

(m) *Payment card network* means an entity that—

(1) Directly or indirectly provides the proprietary services, infrastructure, and software that route information and data to an issuer from an acquirer to conduct the authorization, clearance, and settlement of electronic debit transactions; and

(2) A merchant uses in order to accept as a form of payment a brand of debit card or other device that may be used to carry out electronic debit transactions.

(n) *Person* means a natural person or an organization, including a corporation, government agency, estate, trust, partnership, proprietorship, cooperative, or association.

(o) *Processor* means a person that processes or routes electronic debit transactions for issuers, acquirers, or merchants.

(p) *Route* means to direct and send information and data to an unaffiliated entity or to an affiliated entity acting on behalf of an unaffiliated entity.

(q) *United States* means the States, territories, and possessions of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 235.3 Reasonable and proportional interchange transaction fees.

(a) *In general*. The amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction shall be reasonable and proportional to the cost incurred by the issuer with respect to the electronic debit transaction.

(b) *Determination of reasonable and proportional fees*. An issuer complies with the requirements of paragraph (a) of this section only if each interchange transaction fee received or charged by the issuer for an electronic debit transaction is no more than the sum of—

(1) 21 cents and;

(2) 5 basis points multiplied by the value of the transaction.

* * *